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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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TELEVISION	BRET-870130KO
COMMISSION	BRET-870130KP
	BRET-870130KQ

For Renewal of License of
Stations KETS(TV), et al.
Little Rock, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1991; Released: February 4, 1991

By the Commission:

1. The Commission has before it for consideration: (a) a petition for reconsideration of our *Memorandum Opinion and Order ("Reconsideration Order")* 5 F.C.C. Rcd. 2745 (1990), filed by the Office of Communication of the United Church of Christ and the First Congregational Church of Little Rock, Arkansas (hereinafter "OC/FC"); (b) an opposition from the licensee; (c) petitioner's reply and (d) various related pleadings.[1]

2. In the *Reconsideration Order*, we affirmed our earlier decision, 3 F.C.C. Rcd. 1923 (1988), to grant renewal of license to Arkansas Educational Television Commission (hereinafter AETC"), licensee of noncommercial educational station KETS(TV), Little Rock, Arkansas, subject to EEO reporting conditions.[2] In so doing, we rejected the arguments that the National Black Media Coalition ("NBMC") had earlier raised in a petition to deny the KETS(TV) license renewal, concluding again that a Commission investigation of the licensee's EEO performance during the 1982-1987 license term was not warranted. Similarly, we were not persuaded that an evidentiary hearing was necessary regarding the licensee's admitted violation of Section 73.3527(a)(7) of the Commission's Rules, a matter raised by NBMC and by OC/FC, who had not participated earlier in this proceeding.[3] Based on a number of factors, we concluded that no action was warranted against KETS(TV) at that time. However, we admonished AETC that failure to prepare and maintain its issues/programs lists in a manner fully complying with our rules could result in the imposition of appropriate sanctions in the future.

3. In OC/FC's present petition for reconsideration *("Second Petition")*, it contends that the Commission erred by: (1) dismissing OC/FC's earlier petition for reconsideration *("First Petition")*, but accepting in part the petition for reconsideration of NBMC, even though both parties made identical allegations and filed joint pleadings in opposition to AETC; and (2) not addressing OC/FC's earlier allegations concerning misrepresentation; lack of supervision; relevancy of issues/programs lists created after the license term on actual issue-responsive programming; and ascertainment. Thus, OC/FC asks that we reinstate it as a party in this proceeding, and act upon the material and substantive allegations raised by OC/FC that the Reconsideration Order failed to address.

DISCUSSION

4. **Standing.** We have reviewed the arguments of OC/FC and believe that, under the circumstances of this case, the public interest would be better served by full consideration of the factual allegations and legal arguments singularly and jointly presented by each of the parties below. Accordingly, OC/FC will be accorded party status, notwithstanding its noncompliance with Section 1.106 of the Commission's Rules. With respect to the substantive allegations raised previously by OC/FC and NBMC, we believe that we fairly considered the record before us and properly determined that grant of the licensee's renewal applications was in the public interest. To alleviate any misunderstanding regarding our earlier action and to focus clearly the matters at issue on appeal,[4] we now take this opportunity to address specifically the substantive arguments set forth in the *Second Petition*.

5. **Misrepresentation.** Initially we note, contrary to OC/FC's assertion, that we addressed in our *Reconsideration Order* the issues raised by the petitioners regarding whether the licensee knew or should have known that the public files were out of order when it signed the renewal applications certifying otherwise. With respect to that allegation, we indicated that we had reviewed the facts in the record with regard to petitioners' belief that the licensee knowingly made false statements on its renewal applications by indicating that it had kept the issues-programs lists.[5] *Reconsideration Order*, 5 F.C.C. Rcd. at 2747, para. 17 and 2748, n. 6. On the basis of these facts, we stated that while "the licensee has not complied with the rule, and in fact, it admits that it has not complied with the rule, it appears that there was no intent on its part to either violate the rule or misrepresent to the Commission its failure to comply." *Id.* at 2747, para. 17. Indeed, we noted that "[p]rior to any Commission action on the renewal application of KETS, AETC voluntarily notified the Commission that the station had failed to maintain issues/programs lists during the license term." *Id.*

6. Contrary to OC/FC's contentions, the record evidence does not suggest that the licensee knew or should have known that the public file was out of order when it signed the renewal applications certifying otherwise. Initially, we note that the licensee experienced numerous personnel changes at the management level during the license term. Further, it appears that Oscar E. Goss, an employee at KETS(TV) who had been directed by the former Executive Director of the Arkansas Educational Television Network (AETN) to put KETS(TV)'s public file in order and to work on the issues/programs lists, prepared the AETC license renewal applications for the signature of Michael Mottler. Goss stated that he believed that the monthly PBS program topics lists and the reports of AETC's locally produced programming, which described each program and the issues which the program addressed, were sufficient to satisfy KETS(TV)'s issues/programs public file requirements. Mottler, who was AETN's Associate Director in charge, *inter alia*, of program production and funding development and who had

also temporarily assumed the responsibilities of the former Executive Director, stated that he had assumed that all record-keeping systems and procedures established earlier by AETN were still in place and that all FCC requirements were being adhered to when he signed the AETC license renewal applications. In addition, Donovan Rinker, AETC's current Executive Director, averred that it was he who, on January 21, 1988, first discovered that the issues/programs lists for the 1982-1987 license term had not been prepared and placed in KETS(TV)'s public inspection files. He also determined that the then-pending KETS(TV) renewal application needed to be amended to correct the earlier erroneous response concerning compliance with the issues/programs list public file requirement.[6] As the Commission has previously noted, disqualification of a licensee upon an allegation of misrepresentation can result where there is proof that the licensee engaged in a willful intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127 (1983). The facts noted above do not in any way raise a substantial and material question concerning such intent. We note in this regard that OC/FC does not dispute the licensee's explanation of the personnel situation existing at the station during the license period. Nor has OC/FC presented any persuasive, properly supported allegations to rebut or otherwise discredit the sworn statements from persons with first-hand knowledge of the facts. To the contrary, their case is based on speculation.

7. OC/FC argued in its *First Petition* that the station's Executive Director, Donovan Rinker, purposefully delayed reporting to the Commission the fact that the station had failed to maintain issues/programs lists during the license term. In so doing, OC/FC argued, the licensee violated Section 1.65 of the Rules, which requires an applicant to notify the Commission of decisionally significant information regarding its application as promptly as possible and in any event within 30 days, unless good cause is shown. As noted in the *Reconsideration Order*, Rinker's letter of February 19, 1988, (which was received on February 24, 1988, two days after the 30-day limit), advised the Commission of its noncompliance with the rules, which noncompliance was discovered on January 21, 1988, and not previously raised by any of the parties. *Reconsideration Order, supra*, at 2747, para. 16. Thus, it attempted to inform us prior to the expiration of the 30-day reporting period set forth in Section 1.65(a) of the Rules. While OC/FC maintains that the Commission should have been notified immediately, Rinker states that his purpose in not doing so was to be able to assure the Commission, at the time the amendment was filed, that the oversight had been corrected by the reconstruction and placement of the issues/programs lists in the KETS(TV) public inspection file. While the course of action suggested by OC/FC would have been preferable, we find Rinker's explanation creditable. OC/FC also asserts that Rinker's actions in informing the Commission were calculated to keep the Commission ignorant of KETS(TV)'s noncompliance until after action on the station's license renewal application. We find these allegations to be speculative, inconsistent with AETC's voluntary disclosures, and adequately rebutted by Rinker's sworn statements explaining his actions. We conclude that no substantial and material question of fact is raised by the short delay in reporting the public file misstatement in KETS(TV)'s renewal application.

8. **Lack of Supervision.** With respect to allegations regarding the lack of supervision at station KETS, we reviewed the various facts in the record and noted them in the *Reconsideration Order*, such as the numerous personnel changes during the license term involving employees responsible for preparing and maintaining the issues lists. *Reconsideration Order, supra*, at 2747, para. 16. We also noted that these circumstances resulted in oversight and miscommunication among successive personnel, several of whom were discharging those responsibilities on a temporary basis. *Id.* While we did not specifically so state, it was clear from the record that the level of miscommunication and oversight present at KETS did not rise to the level necessary to raise a substantial or material question for hearing, as was the basis for a hearing designation order in *Trustees of the University of Pennsylvania Radio Station WXPN(FM)*, 69 F.C.C.2d 1394 (1978)(*WXPN*). There, based upon the record in a full evidentiary hearing, which revealed a breakdown in supervision at every level of the station's operation, the Commission denied the station's application for renewal. The lack of supervision that occurred at KETS does not approach that found in *WXPN*. There is no suggestion in this case that the lapses in control or supervision reached beyond the issues/programs documentation responsibilities of the licensee or affected other critical areas of station operation, such as programming or technical compliance. Moreover, as noted in the *Reconsideration Order*, by February 18, 1988, AETC had compiled the issues/programs lists from the AETC reports, PBS's program topic listings, and the stations' program logs, and placed these issues/programs lists in the public inspection file. Further, AETC indicated, and there was no evidence to the contrary, that directives and memoranda had been distributed to station personnel setting forth the Commission's record-keeping requirements and outlining procedures to ensure that the proper issues/programs lists would be prepared and maintained in the stations' public file in the future. *Id.* at 2747, para. 16. Specifically, Goss avers that after Rinker discovered that the issues/programs lists were not in order, Rinker explained to Goss the requirements of the issues/programs lists, assigned him the responsibility of keeping the public inspection file in order and maintaining it in compliance with the FCC's rules, and gave him a memorandum from the station's communications counsel detailing the requirements regarding the file. Additionally, Rinker states that a memorandum was circulated to AETN's staff explaining the purpose and requirements of the public inspection file. Rinker also states that in February 1988, he distributed a packet of material to AETN senior staff that listed basic regulatory record-keeping requirements and outlined the processes to be followed. Thus, it appears that, unlike the situation in *WXPN*, station management has instituted procedures to preclude a recurrence of the record-keeping errors and related problems.

9. **Issues/Programs Lists.** OC/FC states that we did not previously address the issue of whether a licensee may establish its issue-responsive programming by submission of issues/programs lists that were not created until after the license term. At the outset, we reaffirm the clear requirement of our rules and of our broadcast deregulation orders, that issues/programs lists reflecting a station's "most significant" issue programming must be compiled and placed in the public inspection file on an ongoing and contemporaneous basis.[7] There is no dispute that KETS(TV) failed to comply with this requirement.

The licensee's failure in this regard, however, is tempered by several considerations. First, the record below clearly showed, as we noted in the *Reconsideration Order*, that the licensee had kept contemporaneous program logs, reports of its locally produced programs, and monthly PBS programs topics lists, and used those very materials to later construct its issues/programs lists.[8] Moreover, it appears that at least some of this issues/programs documentation was placed in the stations' public inspection file on a regular basis during a substantial part of the license term.[9] In particular, the local program reports, which clearly identified the programs and generally described the issues to which they related, were routinely prepared by station producers and placed in the public file.

10. Second, while contemporaneous issues/programs lists were not maintained, appropriate lists for the relevant period were reconstructed by the licensee from contemporaneous programming records and made available to petitioners. Moreover, as we noted in the *Reconsideration Order*, petitioners have not contended that AETC failed to broadcast programming that was responsive to the issues facing its community of license, which is the key objective behind the rule. Nor, as we stated, has the Commission received any complaint from the stations' viewers suggesting that the stations' programming was not responsive to community issues. With these and other factors in mind,[10] in addition to our finding that the licensee had not intentionally violated the rules, we concluded that no action was warranted against KETS(TV) at that time. While we admonished AETC for its admitted failure to prepare and maintain its issues/programs lists in a manner fully complying with our rules, we have revisited this matter and now find that additional sanctions are appropriate, lest the seriousness which we attach to the licensee's omissions be misconstrued. The failure of a station to properly proffer for public scrutiny the required quarterly issues/programs lists should not be interpreted as a mere record-keeping omission. Indeed, these lists and their public availability play an important role in the proper functioning of the broadcast license renewal process. *See Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702 (D.C. Cir. 1985). To fully ensure the public's ability to evaluate KETS(TV)'s program performance on an ongoing basis during the present license term, as well as afford the Commission the opportunity to monitor the effectiveness of the measures taken by AETC to preclude recurrence of its significant oversight, albeit inadvertent and voluntarily disclosed, we shall appropriately condition the grant of the KETS(TV) license renewal application. AETC will be required, within fifteen days of our action herein, to certify that the required quarterly issues/programs lists covering the first quarter of KETS(TV)'s operation under the station's revised procedures (*i.e.*, January-March, 1988) through the latest quarter (*i.e.*, October-December, 1990) have been compiled and placed in its public inspection file in accordance with our rules. Similar certifications covering the remainder of the present license term are to be filed with the Commission within five days of the quarterly issues/programs lists inclusion in AETC's public inspection file. We also direct that a copy of the certifications required here be served upon OC/FC and the other petitioners in this proceeding.[11] Finally, the present KETS(TV) license is scheduled to expire on June 1, 1992 and its next license renewal application is required to be filed in approximately one year, *i.e.*, no later than February 1, 1992. In conjunction with that application, we shall require AETC to submit to the Commission all of the quarterly issues/programs lists for the entire license term so that we may assess whether it has adequately discharged its duties and responsibilities as a Commission licensee. We believe that the proximity of KETS(TV)'s scheduled renewal filing warrants the Commission's not seeking to make this evaluation at an earlier date. As in situations where a licensee has received only a short-term renewal, however, we will reserve to the full Commission the authority to act on KETS(TV)'s next license renewal application.

11. **Ascertainment.** The petitioners also alleged that for the first two years of the license term, prior to deregulation,[12] the licensee did not perform proper formal ascertainment of community needs as then required by our rules. In support thereof, OC/FC points out that the KETS(TV) official who was responsible for coordinating AETN's formal ascertainment efforts, left the station on October 31, 1983 and that her successor was not given that duty until an unspecified date in 1984. Moreover, the latter individual, Lillian Petrucelli, was a volunteer at that time and was not employed by AETN until June 2, 1985. In petitioners' view, Ms. Petrucelli did not qualify to be the station's ascertainment director as a volunteer.[13] OC/FC also posits that had the required community leader interviews been conducted during this period, the survey contact forms that licensees were, at that time, required to prepare and maintain would have been relied upon in reconstructing the AETC issues/programs lists. Accordingly, OC/FC argued that AETC's failure to perform formal community ascertainment at KETS(TV) and its four other stations warranted exploration in a hearing. In response, AETC does not contest the suggestion that it did not comply with the requirements of the Commission's formal ascertainment policies and regulations.

12. We disagree with the position advanced by petitioners. A hearing is not necessarily required even if we assume, as appears to be the case, that AETC did not conduct community leadership surveys for KETS(TV) and its four other stations in strict conformance with the then-existing ascertainment requirements during the initial period of the 1982-1987 license term. In *Public Broadcasting*, 98 F.C.C. 2d 746 (1985), we found that our formal ascertainment rules "unnecessarily place the emphasis on the methodology used to determine community needs rather than on the key issue of the station's responsiveness to these needs." *Id.* at 752 (citing *Radio Deregulation*, 84 F.C.C. 2d 968, 993 (1981), wherein we stated that ". . . [A]scertainment was never meant to be an end in and of itself. Rather, it is merely a tool to be used as an aid in the provision of programming.") *Public Broadcasting*, *supra* at n. 16. While we expect and will hold all licensees accountable for adherence to the Commission's policies and regulations when in effect, we do not believe non-renewal would be appropriate even if it were established after a hearing that AETC did not conduct ascertainment in the manner then required by the Commission. Most importantly, it appears that the station did make substantial efforts for at least the majority of the five-year term to be aware of the needs in the communities of license. For example, the record indicates that personnel at the station did ascertain community needs prior to producing programming. John Cheek, the Director of the Educative Services Department, avers that during each year of the 1982-1987 license term, each public school in Arkansas was surveyed to determine the effec-

tiveness of instructional television programs aired during the preceding school year. He also states that during the license term, committees were established, which were comprised of specialists throughout the state in particular subject areas, to recommend courses to AETN's Department of Educative Services. Cheek states that AETN also asked each Educational Cooperative Teacher Center Advisory Committee member to rank a number of educational issues in order of importance. In addition to Cheek's statements, Lillian Petrucelli, who between June 2, 1985 and April 1987 was the Acting Development Director and Special Projects Director, stated that in 1984 she was assigned the responsibility of coordinating AETN's formal ascertainment efforts, which previously had been the responsibility of Dana Gibson from 1976 to 1983. Petrucelli states that her efforts included compiling lists of community leaders in different communities in Arkansas, whose names were placed on survey lists and distributed to members of AETN's senior staff for completion of interviews. She also states that she explained to them that ascertainment was an on-going process and gave them a deadline to complete the forms. Finally, Raymond Ho, AETC's former Executive Director, and Mottler indicated that they and others at the station spoke frequently to organizations around the state and solicited their responses about perceived needs and interests, monitored the local media closely, and subscribed to numerous organizational newsletters in order to ascertain the needs of the community. Thus, while the licensee apparently did not comply with the specific requirements of our formal ascertainment rules, it did make substantial informal ascertainment efforts.

13. Moreover, as noted above, the purpose behind the ascertainment rule was to ensure issue-responsive programming. Thus, despite the fact that neither NBMC nor OC/FC has raised a *prima facie* case with regard to the licensee's issue-responsive programming, we have nonetheless thoroughly reviewed the programming documentation submitted by the licensee and find that it has met its issue-reponsive programming obligations. Specifically, as noted in Ho's affidavit and the issues/programs lists submitted with AETC's Opposition to the initial petitions for reconsideration, AETN responded to a variety of community needs with substantial locally produced and nationally produced programming, including instructional and general educational programming and documentaries. These programs included, among many others, "William Grant Still," a biography of an Arkansas native who was the dean of American black composers; "Home Seasoning," a series of programs addressing Arkansas' energy problems; "The Land of Arkansas," addressing environmental issues of particular importance to Arkansas such as soil erosion and the water table; "Beyond 1986," a locally produced series examining pressing issues affecting Arkansas' future such as the economy and the environment; a "job-a-thon" simulcast with KATV, Little Rock, to match job-seekers with available jobs, over the course of many months, "The Job Market," a daily segment for the same purpose; and "Project Second Chance," programs to assist high school dropouts in attaining their diplomas. Based on this, and the other information regarding the licensee's programming, which is set forth in the attachments to AETC's Opposition, we believe that a failure to strictly comply with our former, formal ascertainment requirements for the initial period of the 1982-1987 license term, is not a sufficient basis to impose sanctions upon the licensee or to require a hearing. Here, the licensee has made substantial efforts, both before and after deregulation, to be aware of community issues and has, in our view, provided issue-responsive programming in the public interest throughout the entire license term. While we do not condone the licensee's apparent failure to comply strictly with our formal ascertainment requirements prior to deregulation, due in some measure to the turnover at the station, we do not believe, based upon the information before us, that this alleged failure, even if true, raises a material and substantial question as to the licensee's basic qualifications or requires reversing our earlier action granting the KETS(TV) license renewal application.

14. Having carefully and fully considered the matters set forth in OC/FC's petition for reconsideration, we find that petitioner has failed to demonstrate manifest error or omissions so material as to necessitate a substantial change of our earlier decision in this case. While additional conditions will now be placed upon the grant of the KETS(TV) license renewal application, we affirm our earlier conclusion that renewal is warranted and would serve the public interest.

15. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by the Office of Communication of the United Church of Christ and the First Congregational Church of Little Rock, Arkansas IS GRANTED to the extent indicated herein and otherwise IS DENIED.

16. IT IS FURTHER ORDERED, That the license renewal application for Station KETS(TV) IS GRANTED subject to the EEO conditions specified in FCC 88-77, released April 4, 1988, and to the conditions specified herein:

(1) Arkansas Educational Television Commission shall, within fifteen days of the release of this action, file with the Commission and serve upon each of the petitioners a statement, certifying that the quarterly issues/programs listings covering the period from January, 1988 through December, 1990 have been compiled and placed in its public inspection file in accordance with Section 73.3527(a)(7) of the Commission's rules;

(2) Arkansas Educational Television Commission shall, within five days of the scheduled inclusion of each quarterly issues/programs listings in its public inspection file, file with the Commission and serve upon each of the petitioners a statement, certifying that the quarterly listings for the period January, 1991 through June, 1992 were compiled and are available in its public inspection file as required by our rules; and

(3) Arkansas Educational Television Commission shall, in conjunction with the filing of KETS(TV)'s next license renewal application, submit to the Commission a copy of the quarterly issues/programs lists covering the preceding license term.

17. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - - Return Receipt Requested a copy of this Memorandum Opinion and Order to the Office of Communication of the United Church of Christ, the First Congregational Church of Little Rock, Arkansas, and the other parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] AETC filed a motion to accept supplemental pleading and supplement to opposition to petition for reconsideration. Because it raises relevant points, we will grant their motion and consider this pleading and OC/FC's pleading in opposition to it.

[2] Station KETS(TV), Little Rock, is one of five public television stations licensed to the AETC. The other four stations are: KEMV(TV), Mountain View; KAFT, Fayetteville; KTEJ, Jonesboro; and KETG, Arkadelphia.

[3] Among other things, the rule requires a noncommercial educational broadcast licensee to place in its station's public inspection file, on a quarterly basis, a listing of the programs that have provided the station's most significant treatment of community issues during the preceding three-month period.

[4] On May 29, 1990, a joint notice of appeal was filed with the United States Court of Appeals for the District of Columbia Circuit by OC/FC, NBMC, the Arkansas State Conference of Branches of the NAACP, and the Little Rock Branch of the NAACP. *Office of Communication of the United Church of Christ v. FCC*, Case No. 90-1272. By Order (*per curiam*) issued November 1, 1990, the court held this appeal in abeyance to afford the Commission an opportunity to act upon the *Second Petition*.

[5] These included allegations that had been set forth in the joint reply and the petition to institute a license revocation proceeding.

[6] OC/FC faults AETC for not simultaneously amending the license renewal applications of the other four AETC stations that Goss had also prepared and Mottler had signed. However, those applications were not pending at the time of Rinker's discovery of the error, for each had been granted on May 15, 1987. In addition, AETC, through sworn statements of Goss and Mottler, did subsequently apprise the Commission that those applications had similarly contained the erroneous response concerning compliance with the public file requirement. In view therof, we do not believe that this matter warrants further Commission consideration.

[7] *See* n.3, *supra*.

[8] We also note that, like program logs, issues/programs lists are designed to be prepared after programming has been produced. Thus, a failure to prepare issues/programs lists does not demonstrate a failure to ascertain community needs in advance of producing programming, as previously suggested by petitioners. *See supra*, n. 11.

[9] To the extent this documentation was maintained but not placed in the public inspection file, we note that a licensee may buttress its programming showing by demonstrating programming not described in the issues/programs lists but described in reasonably contemporaneous alternative programming records. *Philadelphia Renewals*, 5 F.C.C. Rcd. 3847, 3851 at n. 13 (1990), citing *Deregulation of Radio*, 84 F.C.C. 2d 968, 999 (1981).

[10] In our earlier action, we stated our mistaken belief that the AETC program reports, the monthly PBS program topic listings and the station's programs logs had been placed in the KETS(TV) public file during the license term. However, it appears that Goss had only placed the AETC program reports in that file. The monthly PBS program topic listings and the daily KETS(TV) program logs, while kept on file at the station, were maintained separately in the offices of the program coordinator and traffic manager, respectively.

[11] The other petitioners in this proceeding are NBMC, the Arkansas State Conference of Branches of the NAACP, and the Little Rock Branch of the NAACP.

[12] Effective September 1984, regulations requiring formal ascertainment and program logging, which had been in effect during the first two years of AETC's 1982-1987 license term, were repealed. *See Final Report and Order Public Broadcasting*, 98 F.C.C. 2d 746 (1984). *See also Commercial TV Stations*, 98 F.C.C. 2d 1076, 1098 (1984).

[13] We find OC/FC's objection to the activities of Ms. Petrucelli as AETC's volunteer ascertainment coordinator to be without merit. The Commission's previous formal ascertainment guidelines and regulations only limited volunteers from interviewing more than 50% of the community leaders contacted by a noncommercial educational television station. *See Ascertainment of Community Problems*, 58 F.C.C. 2d 526, 539 (1976). They did not prohibit the coordination of a station's community leadership ascertainment process by volunteers.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-630

In re Applications of

TOPP BROADCASTING LIMITED PARTNERSHIP (hereafter "Topp")	File No. BPH-880615MB
FOG COMMUNICATIONS (hereafter "Fog")	File No. BPH-880615MH
ROOT RIVER RADIO, INC. (hereafter "Root")	File No. BPH-880616NB
ROCHESTER FM, INC. (hereafter "RFI")	File No. BPH-880616ND
GARY L. LUSK (hereafter "Lusk")	File No. BPH-880616NE
OBED S. BORGEN (hereafter "Borgen")	File No. BPH-880616NT

For Construction Permit
for a New FM Station on Channel
287C2 in Stewartville, Minnesota

HEARING DESIGNATION ORDER

Adopted: December 19, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Background*. The Commission originally allotted Channel 235A to Stewartville, Minnesota, in MM Docket No. 84-231. *See First Report and Order*, 49 Fed. Reg. 3514 (1984). Root, RFI and four other applicants filed applications for Channel 235A at Stewartville during the window filing period for that channel, which closed on June 16, 1988.

3. On October 4, 1988, the Commission released its *Report and Order* in MM Docket No. 87-306, 3 FCC Rcd 5894, to amend the FM Table of Allotments. This *Report and Order*, which became effective November 21, 1988, changed the allocation for Stewartville, Minnesota from Channel 235A to Channel 287C2. The *Report and Order* referenced the Commission's *Public Notice* (Report No. W-40, dated May 12, 1988), which stated that applicants in this proceeding would, in the event the upgrade was adopted, be required to amend to specify the new channel and class.[1] Consequently, the applicants in this proceeding are required to amend their proposals to specify the new channel. To date, no such amendments have been received from Root, Lusk or Borgen and RFI has petitioned to dismiss these applications for listing a channel "that does not exist." However, since the *Public Notice* did not stipulate a final date for such amendments, each of the applicants will be required to submit to the presiding Administrative Law Judge a post-designation amendment specifying the new allocation. Therefore, RFI's petition will be denied.

4. *Fog*. On December 12, 1988, Fog submitted its amendment to specify Channel 287C2 per the *Report and Order* in Docket 87-306. However, a review of the amendment reveals that a coordinate discrepancy exists. Section V-B of Form 301 specifies the coordinates as 43^0 *39' 29"* NL, 92^0 *42' 20"* WL. The transmitter site map and the FAA Form 7460-1 show the coordinates as 43^0 *40' 22"* NL, 92^0 *41' 28"* WL.

5. The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. Thus, in the present case these inconsistent data makes it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. In other cases, the absence of these data makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. § 73.315), and is fundamental to analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities. Consequently, Fog's amendment is unacceptable for filing and will be returned.[2]

6. *RFI*. By amendment dated December 23, 1988, RFI states that it has moved its transmitter site to a new location 14.838 miles southwest of its originally tendered site. RFI's amendment, however, is devoid of the required site availability certification. Accordingly, an appropriate issue will be specified.

7. *Borgen*. Borgen is President, Director and 100% stockholder of KFIL, Inc., licensee of FM Station KFIL (Preston, Minnesota). Since the grant of Borgen's application may result in a violation of the Commission's multiple ownership rules, Borgen has indicated his intent to terminate his relationship with this station in the event of grant of the referenced application. Accordingly, in the event of grant of Borgen's application, Borgen will be required to sever all connections with KFIL (FM) prior to the commencement of program test authority.

8. *Other Matters*. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after September 29, 1988, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the

amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Topp	October 30, 1990
Fog	June 8 and July 18, 1990
RFI	December 23, 1988

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. No determination has been received as to whether the antenna proposed by Topp, Fog, and RFI would constitute a hazard to air navigation. Further, our attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Borgen have been unsuccessful, an issue with respect thereto will be included and the FAA made a party to the proceeding.

11. Topp, Fog and RFI's proposed transmitter sites are short-spaced to the facilities of first-adjacent channel (288A) FM Station KWNG (Red Wing, Minnesota). However, the Commission modified the Table of Allotments by changing KWNG's channel and class from 288A to 290C2. *Report and Order* in MM Docket 87-310, 3 FCC Rcd 5553 (1988), *recon. denied* 4 FCC Rcd 6323 (1989). In its action, the Commission required KWNG to submit a minor change application for a construction permit specifying the new facility. That application (File No. BMPH-891031KE) is currently pending action by the Bureau. Therefore, in the event of grant of any of the three noted applications, program tests may not commence until KWNG commences on-air operations on Channel 290C2.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether RFI has reasonable assurance that the transmitter site specified will be available to the applicant.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Topp, Fog, RFI and Borgen would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Root, Lusk, and Borgen shall submit the required amendment in accordance with paragraph 3 herein to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That the petitions filed by RFI ARE DENIED.

16. IT IS FURTHER ORDERED, That Fog's December 12, 1988 amendment IS RETURNED for the reasons noted in paragraph 5 hereinabove, that the listed petitions for leave to amend filed by Topp, Fog, and RFI ARE GRANTED, and the corresponding amendments ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That, in the event of grant of Borgen's application, Borgen will be ordered to divest himself of all interest in and sever all connection with FM Station KFIL (Preston, Minnesota) prior to the commencement of program test authority.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That, in the event of grant of Topp, Fog or RFI's applications, program test authority may not commence on Channel 287C2 until FM Station KWNG commences program tests on Channel 290C2.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Since these amendments were required pursuant to the Commission's action in the Rule Making proceeding, they are not subject to the late-filed provisions of 47 C.F.R. §§ 1.65 and 73.3522.

[2] We believe that the return of Fog's amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, decided June 15, 1990. In that case, the Court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. § 73.3571(j). The Court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified tolerance of a succession of major amendments." *Id.* at 7. *Golden Shores*, wrote the Court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante*. " *Id.* at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of Fog's amendment "neither results in processing delays nor abridges any cognizable rights of other applicants. *Id.* at 7. Finally, Fog's application was returned to the *status quo ante* with the return of its September 12, 1988 amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORPORATION — File No. I-T-D-91-003

Application for authority
to close VHF-FM Public
Local Service Coast Station
KIL928, Oregon, Ohio.

ORDER AND AUTHORIZATION

Adopted: January 15, 1991; Released: January 28, 1991

By the Chief, International Facilities Division:

1. The captioned application, filed on October 16, 1990 by WJG Maritel Corporation (WJG), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM Public Local Service Coast Station KIL928 located in Oregon, Ohio. The station serves the lakeshore area of Lake Erie within a 30-mile radius of the site. The application was placed on public notice on October 31, 1990. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, WJG states that no messages were made through the subject station from April 1990 through September 1990, resulting in a loss of $2,300. According to WJG, users of the station have available to them SSB, satellite, and cellular communications service as well as the VHF coast station in Detroit, Michigan. Distress calls are handled by the U.S. Coast Guard.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KIL928.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-003 IS GRANTED, and WJG is authorized to discontinue service via its Public Local Service Coast Station KIL928 at Oregon, Ohio.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-635

In re Applications of

MORNING STAR ACADEMY
(hereafter "Star")
Channel No. 219A
New Durham, New Hampshire — File No. BPED-880406MO

CAPITOL CITY EDUCATIONAL FOUNDATION
(hereafter "Capitol")
Channel No. 218A
Concord, New Hampshire — File No. BPED-880808MN

NOTRE DAME COLLEGE
(hereafter "NDC")
Channel No. 219A
Manchester, New Hampshire — File No. BPED-891018ML

KNOWLEDGE FOR LIFE
(hereafter "KFL")
Channel No. 216A
Concord, New Hampshire — File No. BPED-891128MF

KNOWLEDGE FOR LIFE
(hereafter "KFL")
Channel No. 219A
Manchester, New Hampshire — File No. BPED-890516MJ (PREVIOUSLY DISMISSED)

For Construction Permit for a
New Noncommercial Educational FM Station

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial, educational FM station.

2. *Preliminary Matter.* The KFL application for a new noncommercial FM in Manchester, NH (BPED-890516MJ) was returned by staff letter, dated November 22, 1990, for prohibited contour overlap (in violation of 47 C.F.R § 73.509) with second-adjacent channel station WMDK-FM, Peterboro, NH and with cochannel station WNEC-FM, Henniker, NH. On December 22, 1990, KFL filed a petition for reconsideration. The petition argues that WMDK-FM is a commercial station operating on Channel 221A, hence the spacing rules of 47 C.F.R § 73.207(a) should have been utilized instead of the contour overlap rules in 47 CFR § 73.509. Upon review, we find that the return on this count was indeed erroneous. Further, the KFL proposal exceeds the 27.0 km spacing requirement to WMDK by 0.5 km. Consequently, this portion of the KFL petition for reconsideration will be granted.

3. The staff's November 22, 1990 letter also indicated that under the provisions of 47 C.F.R. § 73.215 prohibited contour overlap of 1.7 km in magnitude existed with cochannel station WNEC-FM, Henniker, NH. The staff calculated the distance to the 40 dBu interfering contour at 318.8 degrees to be 24.6 km, while the 60 dBu protected contour of WNEC-FM was found to be located 5.9 km from that station. Consequently, 1.7 km of prohibited overlap was found to exist, since the two stations are separated by only 28.8 km. However, KFL's petition asserts that based on the antenna height above average terrain (HAAT) at 315^0 (WNEC-FM lies only 3.8^0 off this radial), the actual proposed 40 dBu contour distance is 22.52 km, which would not result in contour overlap with WNEC-FM.

4. Upon review, we first note that the proposed station will employ a directional antenna. The distance to the 60 dBu protected and 40 dBu interfering contours along a particular radial must be computed using the actual ERP in that direction. The engineering statement in KFL's petition for reconsideration indicates that an effective radiated power of -24.5 dBk (0.0035 kW) was used to determine the 22.52 km distance to the 40 dBu contour for the proposed facility. However, examination of the directional antenna pattern and tabulation (Table V) indicates that this power is not accurate for this radial. Using linear interpolation between the tabulated relative field values at 315^0 and 320^0, the effective radiated power at 318.8^0 is found to be 0.0038 kW. This value agrees with the plotted directional antenna pattern. Consequently, KFL's use of -24.5 dBk (0.0035 kW) for the effective radiated power understates the distances to the contours along this radial. Using the actual ERP of 0.0038 kW along the 318.8^0 radial, prohibited contour overlap will indeed exist.[1] Consequently, the KFL application remains in violation of 47 C.F.R § 73.509, and this portion of the KFL petition for reconsideration will be denied. Thus, the staff's return of the KFL application for Manchester is affirmed.

5. Accordingly, the KFL petition for reconsideration IS HEREBY GRANTED IN PART regarding the return of the application for contour overlap with commercial FM station WMDK-FM, and IS HEREBY DENIED in all other respects.

6. *Eligibility.* Section 73.503(a) of the Commission's Rules mandates that a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization upon a showing that the station will be used in the advancement of an educational program. KFL states "Living Faith Ministries, Inc., and its to-be-formed affiliate, Knowledge For Life, have as the education purpose the dissemination of religious and nonreligious educational information to members of the corporations and nonmembers alike" (Exhibit 1), and that "The proposed station will disseminate educational pro-

grams and use educational resources available to the applicant and its affiliate." (Exhibit 2). We find the submitted material insufficient to make a determination that KFL is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. §73.503. Accordingly, an appropriate issue will be specified.[2]

7. *TV Channel 6 Protection.* In response to Item 24, Section V-B, FCC Form 301, NDC has provided a map and an engineering statement to demonstrate that the population within the predicted interference area is less than 3000. *See* 47 C.F.R. §73.525. However, an engineering review indicates that the TV Channel 6 interference area is approximately 50 per cent greater than the area depicted by NDC. Accordingly, an appropriate issue will be specified.

8. *Share-time Agreement.* The applicants have not indicated whether an agreement has been reached regarding their pending negotiations of a possible share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

9. The respective proposals are for different communities. Consequently, it will be necessary to determine pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

10. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective service areas.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether NDC is in compliance with the provisions of 47 C.F.R. § 73.525.

2. To determine whether KFL is a qualified educational organization proposing an acceptable educational format in compliance with 47 C.F.R. § 503(a) of the Commission's Rules.

3. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the KFL petition for reconsideration IS GRANTED IN PART regarding the return of the application for contour overlap with a commercial FM station, and IS HEREBY DENIED in all other respects.

14. IT IS FURTHER ORDERED, That the Capitol "petition to dismiss or deny" IS HEREBY GRANTED to the extent indicated.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] A computer-generated contour overlap study run by the staff demonstrates that the amount of prohibited contour overlap with WNEC-FM is significantly greater in directions off the line between the two stations. This study shows that up to 3.2 km of overlap between the 60 dBu protected contour of WNEC-FM and the 40 dBu interfering contour of KFL's proposal will exist in violation of 47 C.F.R. § 73.509. This is not addressed either in the original application or the petition for reconsideration.

[2] On February 14, 1990, Capitol Broadcasting Corp., Inc. ("Capitol"), licensee of radio station WKXL-FM, Concord, New Hampshire, filed a "petition to dismiss or deny" the KFL application, raising the same eligibility issue. Accordingly, the Capitol petition will be granted to the extent indicated.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-632

In re Applications of

SUSAN BEAUCHAMP (hereafter "Beauchamp")	File No. BPH-880217MS
WASHINGTON COUNTY COMMUNICATIONS, INC. (hereafter "WCC")	File No. BPH-880217MW
RADIO WAKEFIELD, INC. (hereafter "RWI")	File No. BPH-880217NA
AMERZINE BROADCASTING, L.P. (hereafter "Amerzine")	File No. BPH-880217NB
WAKE PARTNERSHIP (hereafter "Wake")	File No. BPH-880217NG
BLOUNT COMMUNICATIONS, INC. (hereafter "Blount")	File No. BPH-880217NJ
WAKEFIELD BROADCASTING LIMITED PARTNERSHIP (hereafter "WBLP")	File No. BPH-880217MQ (Dismissed Herein)
HOLLY P. WOOD, STEFANIE S. PABIS and KRYSTYNE M. PABIS (hereafter "Wood")	File No. BPH-880217MO (Previously Dismissed)

For Construction Permit
for a New FM Station on
Channel 259A (99.7 MHz)
in Wakefield-Peacedale, Rhode Island.

HEARING DESIGNATION ORDER

Adopted: December 19, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters. Wood.* On June 10, 1988, Wood filed a petition for reconsideration of the May 20, 1988 action by the Chief, FM Branch, returning its application as unacceptable for tender for failure to include the legal boundaries of the city of Wakefield-Peacedale, and its failure to submit a 7.5 minute USGS topographic site map that complies with the *Public Notice* entitled "FCC Clarifies Transmitter Site Map Requirements", Mimeo 3693, released April 5, 1985.[2] WCCI and RWI filed oppositions to the petition for reconsideration.

3. Wood argues that its application meets the Commission's processing policy adopted in the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985). Wood states that Exhibits 2 and 3 of the original application provided the Commission with a basis whereupon it could accurately and reliably determine the proposed transmitter site location and the 60 dBu and 70 dBu contours. The Commission could determine that the community of Wakefield, of which Peacedale is an adjoining community, is completely encompassed by the 3.16 mV/m signal contour. Furthermore, Wood recognized its inability to obtain a 7.5 minute map, but provided the Commission with a 15 minute USGS topographic map which contained sufficient information upon which the Commission could determine the location of the proposed transmitter site.

4. Under the "hard look" doctrine instituted by the Commission in its *Report and Order*, a petition for reconsideration of a finding of untenderability will lie only when the petitioner can demonstrate that the application met all of the tenderability requirements at the close of the window filing period. If any one of the tenderability elements described in Appendix D to the *Report and Order* is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Furthermore, resubmission of such application with a curative amendment will not be considered for *nunc pro tunc* reacceptance.

5. The *Report and Order* requires an applicant to submit a map satisfying the requirements of Section V-B, Item 16, and which *clearly* and *legibly* shows the 70 dBu contour as well as the legal boundaries of the community to be served. Such information is essential to the processing of the application so as to determine the applicant's compliance with Section 73.315(a) of the Commission's Rules. In the instant case, the legal boundaries of the city of Wakefield-Peacedale are clearly not indicated. The name "Wakefield" can be seen on the submitted map, but the specific area to which it references cannot be determined.

6. In addition, the *Report and Order* requires that an applicant submit a transmitter site map as described in FCC Form 301, Section V-B, Item 15 and in the Commission's April 5, 1985 *Public Notice*. The *Public Notice* clarifies the requirement that applicants submit a 7.5 minute series USGS topographical quadrangle map, where available, which identifies the transmitter site. Such a

map allows the staff to verify the coordinates of the proposed site, the presence of other, nearby communications facilities, of obstructing terrain features and the ground elevation of the transmitter site. The Wood petition discusses the unavailability of the required 7.5 minute map and the substitution of a 15 minute topographic map. Wood re-emphasizes that this fact had been brought to the Commission's attention in its original application when it stated that "the 7.5 minute topographic map which encompasses the proposed site is not at this time available from the USGS, nor has it been available for many months." Where the 7.5 minute map is either not printed or is not available from stock, a 15 minute map that complies in all other respects with the April 5th *Public Notice* is an acceptable substitute. As Wood's 15 minute map submission is sufficient in this regard, the petition for reconsideration will be granted to this extent.

7. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. § 1.106(d)(2). In the absence of such showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. Furthermore, in accordance with the *Report* and *Order*, the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. We have examined the instant petition and have determined, with regard to the city boundary tenderability requirement, that the Commission did not error in returning Wood's application as unacceptable for tender. Accordingly, Wood's petition will be denied.

8. *WBLP*. Pursuant to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission established criteria by which an application's substantial completeness could be determined. In order to be deemed sufficient for tender, commercial FM Broadcast applications must include a transmitter site map as described in FCC Form 301, Section V-B, Item 13 and in the Commission's *Public Notice*, Mimeo 3693, released April 5, 1985. *See* 50 Fed. Reg. 19945 at para. 4(b). The *Public Notice* clarifies the requirements found in FCC Form 301 that each applicant submit a 7.5 minute series USGS topographical quadrangle map which identifies the transmitter site. *See also, FM Transmitter Site Map Submission Required by FCC Form 301 and 340*, 1 FCC Rcd 381 (1986). The *Public Notice* also specifies certain technical requirements that the site map must satisfy in order to be considered tenderable. Specifically, the applicant must provide a site map that shows along the printed margins of both axes at least two coordinate markings specifically labeled by USGS, one on either side of the marked site. While WBLP provided the original minute and seconds markings, 27' 30" and 25' 00", its 41^0 markings appears to be handwritten.

9. Under the "window" processing system for commercial FM construction permit applications adopted in the *Report and Order, supra*, any error in or ommission from key portions of an application as of the close of the pertinent filing window requires the return of that application as not substantially complete or insufficient for tender. *Id.* at para. 23. Accordingly, as WBLP's deficient 7.5 minute map renders the application untenderable, WBLP's application will be dismissed herein as inadvertently accepted for tender. [3]

10. *Beauchamp*. On June 24, 1988 Beauchamp filed a timely amendment to her application changing the antenna height and specifying a new transmitter site. As her attorney noted in the cover letter, he was submitting the facsimile signature of Beauchamp; pages bearing the original signature of the applicant would be submitted upon receipt by counsel. The supplemental amendment containing Beauchamp's original signature was not received until July 28, 1988.

11. Beauchamp's June 24, 1988 amendment is procedurally defective since it did not contain her original signature pursuant to 47 C.F.R. § 73.3513(a)(1). Moreover, neither the June 24, 1988 nor July 28, 1988 amendments were accompanied by any justification as to why Beauchamp could not satisfy the Commission's procedural requirements in this matter. Therefore, the June 24, 1988 amendment is unacceptable for filing and will be returned.[4] Additionally, Beauchamp's July 28, 1988 amendment cannot be accepted for filing. In its *Report and Order* in Docket 84-750, *supra*, the Commission adopted strict rules governing the acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right prior to expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. *See*, 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments will be considered only upon a showing of good cause for late filing or pursuant to Sections 1.65 or 73.3514 of our rules. Unauthorized or untimely amendments are subject to return without consideration.

12. Pursuant to *Public Notice*, Report No. 14181, May 25, 1988. Beauchamp's 30 day period for filing amendments as of right began May 27, 1988 and ended June 27, 1988. The amendment containing Beauchamp's original signature was filed after this period. Furthermore, no showing of good cause accompanied the amendment pursuant to 47 C.F.R.§ 73.3522(a)(2). Therefore, the July 28, 1988 amendment is untimely and will be returned. Beauchamp's altered antenna height and proposed new transmitter site cannot be studied. The Commission must revert to the engineering parameters contained in the original application and Beauchamp's application will be processed as originally filed on February 17, 1988.

13. *Blount*. In Section V-B, Item 7(a)(1) of Blount's application, as originally filed, the site elevation is listed as 91 meters. However, the transmitter site map (Exhibit 2b) shows the site elevation as 76 meters.[5] Since neither value results in a violation of the maximum ERP/HAAT combination specified in 47 C.F.R. § 73.211 for Class A facilities, the defect is neither a tenderability defect nor an acceptability defect and may, therefore, be resolved with an amendment. We note that Blount filed such a corrective amendment on July 21, 1988 rectifying the site elevation discrepancy. Accordingly, for administrative purposes, Blount's late-filed amendment will be accepted for filing.

14. We also note that on May 1, 1989, Blount filed a petition for leave to amend to specify a new transmitter site.[6] In support of its request for acceptance of the late-filed amendment, Blount states that it was informed by the Federal Aviation Administration ("FAA") on February 22, 1988, that its originally proposed site violated Part 77 Obstruction Standards. The Commission has traditionally considered FAA disapproval to be "good cause"

for a site relocation amendment. *See e.g. Orlando FM Group Limited Partnership*, 2 FCC Rcd 4696 (1987). Blount has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. However, in keeping with the Commission policy, Blount will not be allowed to gain comparative advantage from its amended site. Therefore, Blount's petition for leave to amend will be granted and the accompanying amendment will be accepted to the extent indicated herein.

15. *RWI*. RWI amended its application on June 6, 1989 and December 19, 1989 to report that its principal, Carol M. Carson, became Account Executive at station WWAZ(AM), Providence, Rhode Island and Sales Manager of WWLI(FM), Providence, Rhode Island. The amendments include a pledge that Ms. Carson will resign both positions at WWAZ(AM) and WWLI(FM) upon grant of the RWI application. Because Ms. Carson's continued employment at WWAZ(AM) and WWLI(FM) may potentially violate the Commission's cross-interest policy, an appropriate divesture condition will be specified. *See Re-examination of the Commission's Cross-Interest Policy*, 4 FCC 2d 2208 (1989).

16. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Wake has filed such statement, it is deficient. Wake has not listed specific sources of recruitment specializing in women candidates. Accordingly, Wake will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

17. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Wake has not completed Item 4 correctly. The Wake application gives a post office box number as the residence address for Marcus Rand and Eleanor Rand. Accordingly, Wake must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

18. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Beauchamp	June 14, 1990
Blount	July 21, 1988 (engineering) March 28, 1990
RWI	June 6, 1989; December 19, 1989 August 1, 1990
Wake	May 24, 1989

19. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Beauchamp, Blount and WCCI would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

20. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

21. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

22. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that& the tower heights and locations proposed by Beauchamp, Blount and WCCI would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

23. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Wood on June 10, 1988 IS HEREBY DENIED. RWI's May 16, 1988 petition to dismiss Wood's application IS DISMISSED AS MOOT.

24. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 8 and 9 hereinabove, WBLP's application IS HEREBY DISMISSED as inadvertently accepted for tender.

25. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 8 and 9 hereinabove, RWI's May 16, 1988 petition to dismiss WBLP's application IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. WBLP's June 17, 1988 supplement and RWI's July 11, 1988 motion to strike ARE HEREBY DIMISSED pursuant to 47 C.F.R. § 1.45(c).

26. IT IS FURTHER ORDERED, That the amendments of June 24, 1988, July 28, 1988 and November 6, 1990, filed by Beauchamp ARE HEREBY RETURNED.

27. IT IS FURTHER ORDERED, That RWI's petition to dismiss Blount's application IS HEREBY DENIED, for the reasons set forth in paragraph 13 hereinabove.

28. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraph 14 hereinabove, RWI's June 22, 1989 opposition to Blount's May 1, 1989 petition for leave to amend, IS HEREBY DENIED.

29. IT IS FURTHER ORDERED, That in the event of grant of RWI's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of operation of the station authorized herein pursuant to program test authority, the permittee shall certify to the Commission that Carol M. Carson has terminated all employment at stations WWAZ(AM) and WWLI(FM), Providence, Rhode Island.

30. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Wake shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That Wake shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

32. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Beauchamp, Blount, RWI and Wake ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

33. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

34. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on hehalf of the Chief, Mass Media Bureau. Parties May inquire as to the Identity of the Counsel of recored by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureu, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

35. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Sedction 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order.

36. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] RWI had filed a petition to dismiss the application of Southern Rhode Island Broadcasting, Inc. (SRIB), (BPH-880217NC), on May 16, 1988. However, on June 22, 1988, SRIB, by its attorney, requested dismissal of its application. The request was in accordance with our requirements governing such matters. Accordingly, the application, as well as all accompanying pleadings, were dismissed by Commission letter dated September 14, 1990.

[2] RWI had filed a petition to dismiss Wood's application on May 16, 1988 raising identical issues to those cited in the FM Branch's return letter. In light of the ultimate return of Wood's application, RWI's petition will be dismissed as moot.

[3] On May 16, 1988, RWI filed a petition to dismiss WBLP's application alleging, *inter alia*, that the 41-S markings shown on WBLP's transmitter site map are not those specifically labeled by USGS. WBLP filed an opposition and RWI a reply. In light of the action taken herein, RWI's petition will be granted for the reasons noted in paragraphs 8 and 9 hereinabove, and denied in all other respects. Further, the WBLP supplement and the RWI motion to strike are being dismissed as unauthorized pleadings pursuant to 47 C.F.R. § 1.45(c).

[4] On November 6, 1990 Beauchamp filed a supplemental amendment to its June 24, 1988 amendment. In light of the above action, its November 6, 1990 amendment will also be returned.

[5] On July 8, 1988 RWI filed a petition to dismiss Blount's originally filed application. Blount filed an opposition and RWI filed a reply. For the reasons set forth in paragraph 13, hereinabove, RWI's petition will be denied.

[6] On June 22, 1989 RWI filed an opposition to petition for leave to amend alleging, *inter alia*, that Blount's petition to specify a new transmitter site is in violation of § 73.3522(a)(6) of the Commission's Rules. For the reasons set forth in paragraph 14, hereinabove, RWI's opposition will be denied herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-625

In re Applications of

Evan Doss, Jr., Corporation (hereafter "Doss") — File No. BPH-890420MH

Edward Carter, Sr., d/b/a Tri-County Broadcasting, L.P. (hereafter "Carter") — File No. BPH-890420MP

For Construction Permit for a New FM Station on Channel 263A (100.5 MHz) in Port Gibson, Mississippi

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

6. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-618

In re Applications of

HEART OF THE LAKES BROADCASTING (hereafter "Heart") — File No. BPH-881221MO

BRUCE HARRISON LINDER (hereafter "Linder") — File No. BPH-881221MP

INGSTAD BROADCASTING, INC. (hereafter "Ingstad") — File No. BPH-881221MQ

For Construction Permit
for a New FM Station
on Channel 281C2 (104.1 MHz)
in Pelican Rapids, Minnesota

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ingstad*. Section II, Item 6(b) asks:

> Does any member of the immediate family (i.e., husband, wife, father, mother, sister or brother) of any party to this application have any interest in or connection with any other broadcast station, pending broadcast application, newspaper in the same area (see Section 73.3555(c) or, in the case of a television station applicant only, a cable television system in the same area (see Section 76.501(a))?

Ingstad answered in the negative. In its accompanying exhibit however, the applicant indicated that:

> Certain relatives of Jack W. Ingstad, President, Director and 50% stockholder and James Ingstad, Vice President and 50% stockholder of the subject application have broadcast interests, but a listing of those relatives and their broadcast interests does not appear to be required by Form 301.[1]

This response is not adequate, as Ingstad has failed to indicate why these broadcast interests are to be excluded. Ingstad will therefore be required to submit the appropriate amendment to the presiding Administrative Law Judge.

3. Linder petitioned for leave to amend his application on August 17, 1989 and October 27, 1989. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Heart has not completed Item 4 correctly. Heart's application gives a post office box number as the residence address for Michael Steele. Accordingly, Heart must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. The FAA has determined that the towers proposed by Heart, Linder, and Ingstad would constitute a hazard to air navigation and the applicants have failed to file amendments to remedy the situation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Heart, Linder and Ingstad would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Ingstad must clarify its response governing the broadcast interest held by relatives of Jack W. Ingstad and James Ingstad, as detailed in paragraph 2 hereinabove, by submitting the appropriate amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Linder ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That Heart shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Our ownership records reveal, for example, that Robert E. Ingstad owns 100% of Radio Ingstad Minnesota, Licensee of stations KDHL(AM) and KQCL(FM) in Faribault, Minnesota and 80% of Radio Ingstad Nebraska, Licensee of KKPR(AM & FM) in Kearney, Nebraska.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-621

In re Applications of

JOHN STRELITZ (hereafter "Strelitz)	File No. BPH-890313MT
VINCENTE SILVA (hereafter "Silva")	File No. BPH-890313MU
SKR, INC. (hereafter "SKR")	File No. BPH-890313MV
JEMEZ MOUNTAIN BROADCASTERS (hereafter "Jemez")	File No. BPH-880310MI (PREVIOUSLY DISMISSED)
T.C. MONTE, INC. (hereafter "Monte")	File No. BPH-890313MS (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 234C (94.7 MHz)
in Santa Fe, New Mexico

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On February 1, 1988, the Commission announced a filing window for applications to serve Santa Fe, New Mexico on Channel 234C. This window commenced on February 1 and closed on March 10, 1988. *Public Notice*, Report No. W-33 (released February 1, 1988). Since all of the applications filed in this window were subsequently found unacceptable for filing, the Commission announced that applications proposing to serve Santa Fe on this channel could be filed as of March 13, 1989. *Public Notice*, Report No. FCFS-13 (released March 6, 1989). Four applications were filed on March 13th; therefore, pursuant to 47 C.F.R. § 73.3564(d)(4), they must be treated as "simultaneously filed" and are therefore mutually exclusive with each other.

3. Jemez's application was filed during the initial filing window. However, it was returned as unacceptable for filing on February 6, 1989. *Letter to Mr. Jeffery R. Kline from Dennis Williams, Chief, FM Branch*. In its letter, the FM Branch denied Jemez's request for waiver of the Commission's spacing requirements (47 C.F.R. § 73.207). In its waiver request, Jemez claimed that "all of the suitable [fully-spaced] sites are located on U.S. Forest land" and are therefore not available to any applicant for Channel 234C. The Branch's letter rejected this argument, stating that Jemez "provided no evidence to support [its] contention that no non-short-spaced or lesser short-spaced sites exist."

4. On March 28, 1989, Jemez petitioned for reconsideration of the Branch's action. In its petition, Jemez argues that its waiver request did not receive the "hard look" required by *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir.,1969). *Reconsideration*, at page 2. Specifically, Jemez contends that the lack of evidence in its request for waiver "is no basis for summary denial of the waiver" and that "the waiver movants showing is to be viewed with some indulgence." *Id*. Jemez complains that "[t]here was a time when the staff would have requested orally or in writing for a supplement to the waiver showing," and argues that the Branch could have alternatively specified "an appropriate hearing issue to meet a burden of evidentiary proof." *Reconsideration*, at page 3.

5. Jemez has clearly misread *WAIT Radio*. In that decision, the Court clearly stated the agency's responsibility to provide a "hard look" at any allegation "made by petitioners, stated with clarity *and accompanied by supporting data*. " *WAIT*, at 1157 (emphasis added). As it footnoted at this juncture in its decision, the Court referenced the comment in *Pikes Peak Broadcasting Co. v. FCC*, 422 F. 2d 671 n.8 (D.C. Cir., 1969), that applicants for waiver "must articulate a specific pleading, and adduce concrete support, preferably documentary." Clearly, the request prepared for Jemez in Exhibit 13 of its application failed to provide any evidence supporting its allegation.[1] Jemez's petition, given its basis on procedural grounds, must accordingly be denied.

6. According to our analysis and Monte's own calculation, its proposed transmitting antenna site is short-spaced by 7.8 kilometers to the licensed facilities of FM Station KZRR (Albuquerque, New Mexico). Monte has requested waiver of the rules (47 C.F.R. § 73.207) to permit this short-spacing, stating that "a reasonable site which was not short-spaced could not be located so one was chosen which had less than 8 kilometers short-spacing so the applicant could amend the application using a directional antenna after the effective date of [MM] Docket 87-121." *Engineering Statement*, dated March 11, 1989.

7. Since Monte never amended its application after the June 26, 1989 effective date of MM Docket 87-121, its proposal must be judged in light of the fully-spaced proposals for Channel 234C. Specifically, Monte's application must raise a substantial question of fact regarding all fully-spaced proposals in order to warrant inclusion in the proceeding and specification of a short-spacing issue. *See, e.g., Clearlake Broadcasting Company*, 47 Fed. Reg. 47931 (1982). A careful review of both the application and amendments reveals no such evidence. Therefore, Monte's request for waiver of the spacing rules must be denied and its application returned as unacceptable for filing.

8. *SKR*. On July 14, 1989, SKR amended its application to specify a new transmitting antenna site, approximately "290 meters to the north of that originally specified." However, SKR's amendment failed to include a certification of reasonable assurance of the availability of this amended site on Picuris Peak. Therefore, the appropriate issue will be specified.

9. SKR indicated that it notified the Federal Aviation Administration on June 12, 1989 of its proposed construction on Picuris Peak. However, our Antenna Survey

Branch indicates that the tower heights specified in SKR's application (64 meters AGL/3356 meters AMSL) exceed those on file with the FAA (49 meters AGL/3341 meters AMSL). Accordingly, an air hazard issue must be specified. To remedy this discrepancy, SKR must amend either the data in its application or that on file with the FAA.

10. *Other matters*. The engineering data submitted by Strelitz, Silva and SKR does not clearly demonstrate that each provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). The applicants, whose coverages range between 20 to 56% of Santa Fe's residential area, have each requested waiver of the Commission's Rules. As Silva noted in support of his request, the difficulty facing applicants in this proceeding was to propose a site that would "provide good coverage of the Santa Fe area" while simultaneously avoiding short-spacing and line-of-sight problems. "The area which meets these two conflicting criteria," Silva indicated, "is limited due to wilderness area and governmental restrictions." A coverage issue must therefore be specified in this matter.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether SKR has reasonable assurance of the availability of its site.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by SKR would constitute a hazard to air navigation.

3. To determine whether the proposals of Strelitz, Silva and SKR would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Jemez's petition for reconsideration IS DENIED.

14. IT IS FURTHER ORDERED, That Monte's application IS RETURNED as unacceptable for filing.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In its entirety, that exhibit stated:

The applicant seeks a waiver of Section 73.207 of the Commission's rules to permit short-spacing to commercial FM broadcast station KZRR, Albuquerque, New Mexico. As is clear from Exhibit SFA-1-FM, the proposed site is 8 kilometers closer to KZRR than is permitted by the rules.

The location of Santa Fe, the requirement for height above average terrain for a Class C facility such as that for which the applicant is applying, and the fact that all of the suitable sites are located on U.S. Forest Service land, makes location of a suitable nonshort-spaced site not possible. The Forest Service limits the locations on land which it controls at which communications facilities can be located. The only other suitable site suggested by the Forest Service was one at which the short-spacing would be more severe than at the present site.

In light of the foregoing, grant of a waiver to permit operation at the present site is appropriate, and would serve the public interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-622

In re Applications of

BLACK HILLS CHRISTIAN COMMUNICATIONS, INC. (hereafter "Black Hills")	File No. BPH-890123MO
UPPER COLUMBIA BROADCASTING, INC. (hereafter "UCB")	File No. BPH-890123MV
EARLIMART EDUCATIONAL FOUNDATION, INC. (hereafter "Earlimart")	File No. BPED-890123MA (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 284-A
in Spokane, Washington

HEARING DESIGNATION ORDER

Adopted: December 3, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* On April 13, 1990 and April 17, 1990, respectively, Black Hills and UCB filed Petitions To Deny against Earlimart stating, *inter alia*, that Earlimart is short spaced to station KMJY-FM, Newport, Washington and to the allotment of Channel 284-A in Cranbrook, British Columbia, Canada. On July 19, 1990, Earlimart filed an Opposition To Petition To Deny,[1] stating that it had filed a request for waiver of the Commission's spacing rules, and that the question of short spacing can and should be addressed at the hearing.

3. An engineering review of Earlimart's application reveals that the proposal is short-spaced by 2.0 kilometers to a previously filed and granted construction permit application (BPH-880823IA, granted November 28, 1988) which modified the licensed facilities of station KSMP-FM (now KMJY-FM), Newport, Washington.[2] A license to cover that permit has since been granted by the Commission (BLH-891130KC, granted September 12, 1990). Therefore, Earlimart's application was inadvertently accepted for filing and will be returned below.[3] Additionally, Black Hills' and UCB's petitions will be dismissed as moot.

4. On April 13, 1990, Black Hills filed a Petition To Deny against the application of UCB, stating that UCB failed to certify that sufficient net liquid assets were on hand or that sufficient resources were available from committed sources to construct and operate its requested facilities for three months without revenue. UCB failed to file an amendment in order to make this certification within the amendment as of right period. Black Hills contends that this demonstrates contempt for the financial requirement on the part of UCB, and that it should serve as an admission that UCB is not financially qualified to be a Commission licensee. For these reasons, Black Hills seeks the dismissal of UCB's application.

5. On April 25, 1990, UCB filed an Opposition to Petition To Deny, stating that the Commission issued its *Report and Order*, in the *Revision of Construction Permit Application*, 4 FCC Rcd 3835 (1989) adopting, *inter alia*, stricter requirements regarding financial qualifications. UCB states that the Commission has made it clear that the new financial certification rules do not apply to its application, since it was filed before June 26, 1989, the date upon which the new rules became effective. We agree. Under the old processing guidelines where the financial certification box was checked "no", an issue was designated against the mutually exclusive applicant for resolution at hearing. Accordingly, such an issue will be designated against UCB below, and Black Hills' petition will be granted to that extent and denied in all other respects. *See e.g., Goodhartt Broadcasting, Inc.*, DA 90-1055, MM Docket No. 90-367, released August 23, 1990.

6. The engineering data submitted by Black Hills does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See* also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that Black Hills' 3.16 mV/m contour would cover approximately 95.8% of the area of the community of license, and 98.6% of its population. Accordingly, no waiver is required.

7. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Black Hills and UCB have not completed Item 4 correctly. Black Hills' application gives a post office box number as the residence address for Mark Pluimer, Lavern Willson, and Pat Alley. UCB's application gives a post office box number as the residence address for J.D. Toms. Accordingly, Black Hills and UCB must submit amendments providing all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

8. The applicant below has petitioned for leave to amend their application on the dates shown. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative

position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
UCB	July 14, 1989

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to UCB, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 3, *supra*, Earlimart's October 2, 1989 amendment IS HEREBY RETURNED, and its application IS HEREBY RETURNED as inadvertently accepted for filing.

12. IT IS FURTHER ORDERED, That the Petitions To Deny filed by Black Hills and UCB against Earlimart ARE HEREBY DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, That the Petition to Deny filed by Black Hills against UCB IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

14. IT IS FURTHER ORDERED, That Black Hills and UCB shall submit amendments which contain the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by UCB IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Earlimart only filed an Opposition against the Black Hills Petition To Deny. However, since Black Hills' petition espouses, *inter alia*, the same issues as the UCB Petition To Deny, we will consider the Opposition as an answer to both. This Opposition was not timely filed and therefore is an unauthorized pleading under 47 C.F.R. §1.45. However, in order to dispose of the issue raised in the petitions using as complete a record as possible, we will consider the opposition in our motion.

[2] This engineering review also indicates that Earlimart's proposal is not short-spaced to the Cranbrook allotment.

[3] On October 2, 1989, Earlimart filed a request for waiver of the Commission's short spacing rules. However, the Commission has instituted a "hard look" processing policy whereby applicants may submit amendments curative of tenderability or acceptablity defects only within the period for amendment as of right. *Report and Order* in Docket 84-750, 50 Fed. Reg. 19,936 (May 13, 1985). *See also* 47 C.F.R. § 73.3522(a)(6). In this case, the amendment as of right period expired on July 10, 1989. Earlimart's waiver request, therefore, was untimely and will be returned below. We note that Earlimart's amendment/waiver request for a short-spacing of this magnitude would not have made its proposal acceptable even if it had been timely, since other applicants had submitted proposals which contained fully spaced sites. *See Donovan Burke*, 60 RR 2d 110 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Evergreen Media
Corporation of
Chicago AM

Licensee of Radio Station
WLUP(AM), Chicago, IL

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 18, 1991; Released: January 28, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a $6,000 Notice of Apparent Liability (NAL) issued November 30, 1989, to Evergreen Media Corporation of Chicago AM (Evergreen Media), licensee of Station WLUP(AM), Chicago, Illinois; and (2) Evergreen Media's response to the NAL dated January 29, 1990.

2. The NAL was issued for apparent violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1] Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ("*Pacifica* "), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts under this definition, and the United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT* ").

3. The complaint underlying the NAL alleged that on August 19, 1987, between 2:30 and 4:30 p.m., and on March 30, 1989, at 5:10 p.m., WLUP(AM) aired indecent material on the "Steve and Garry Show." On August 24, 1989, the Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, requested the licensee's comments regarding these allegations, and Evergreen Media responded by letter dated October 10, 1989. After reviewing all the information before it, the Mass Media Bureau determined that the three broadcasts transcribed in Attachment 1 apparently violated 18 U.S.C. § 1464 and on November 30, 1989, issued a notice of apparent liability regarding that material.

4. In its January 29, 1990, response, Evergreen Media argues that Section 503(b)(6) of the Communications Act[2] bars the Commission from issuing a forfeiture as to the two broadcasts on August 19, 1987, which occurred in WLUP(AM)'s previous license term and more than one year prior to the issuance of the November 30, 1989, NAL. According to Evergreen Media, this section of the Communications Act should be interpreted to mean that a forfeiture order cannot issue for a violation occurring more than a year ago and in a previous license term, even if a notice of apparent liability for a monetary forfeiture regarding the violation issued in a timely manner within that previous license term. Applying this interpretation of the statute to the case before us, the licensee suggests that because its current term began December 1, 1989, a forfeiture order cannot be issued today regarding conduct that occurred on August 19, 1987, or on March 30, 1989, notwithstanding that the November 30, 1989, NAL was issued to WLUP(AM) before the current term began.

5. Before turning to Evergreen Media's other arguments, we address the issue of whether a forfeiture order concerning the subject broadcasts may be issued after the commencement of WLUP(AM)'s current term, which began on December 1, 1989. As the licensee argues, an NAL and a forfeiture order are not equivalent, and an NAL does not itself impose a forfeiture. Section 503(b)(6), in fact, emphasizes the distinction between a forfeiture order and an NAL. It creates a prerequisite for issuance of a forfeiture penalty, and that prerequisite is in the form of notice, or notice of apparent liability. Moreover, the statute requires that a forfeiture be preceded by notice or NAL within one of two time frames in relation to the violations. The notice, or NAL, if issued more than three years past the date of the violation, cannot result in the imposition of a forfeiture penalty. Similarly, a notice, or NAL, if issued more than one year after the violation occurred, cannot result in imposition of a forfeiture penalty if a new license term began prior to said notice or NAL. In other words, if the conduct sought to be sanctioned occurred in one license term and the NAL occurred in the succeeding license term, the NAL must be issued within one year of the conduct; if the conduct sought to be sanctioned occurred in the same license term as the NAL, the NAL must be issued within three years of the conduct. In this case, because the NAL of November 30, 1989, was issued in the same license term as the conduct, the Commission is authorized to impose a forfeiture penalty for alleged violations occurring within three years preceding the NAL. [3]

6. Raising another argument based on passage of time, Evergreen Media urges that the Commission exercise its discretion not to impose a forfeiture because "contemporary community standards for the broadcast medium" may have changed since August 1987, and, consequently, the trier of fact may be unable to make a determination based on standards that were contemporary at the time of the broadcast. We do not believe, however, that there has been any change in the relevant broadcast standards between August 1987 and today's date that should lead to a different result with respect to the broadcasts transcribed in Attachment 1.

7. In addition, Evergreen Media repeats and incorporates all the arguments made in response to the Commission's letter of inquiry, asserting that the subject material was not indecent. It argues that the March 30, 1989, broadcast was a "straightforward description" of a picture of Vanessa Williams in *Penthouse* magazine, and advises that the discussion occurred in the context of a conversation about pornography which led to a spoof of Ms. Williams' appearance on NBC Television's Bob Costas Show. The licensee states that the broadcast comments were political and social commentary and gave a "simple, accurate description of a picture of oral-genital contact," in language that was explicit but not erotic or suggestive; that they included innuendo which was not capable of only one, sexual, meaning; that they were not readily understandable by children; and that they were in each case no more than "a fleeting, isolated reference." As to the August 19, 1987, broadcasts, Evergreen Media argues that neither contained explicit language. Rather, they claim that the "Kiddie Porn" song, sung by a call-in participant, contained only mild innuendo, and the called-in joke alluding to homosexual activity contained one double entendre which was not surrounded by explicit sexual references. The licensee asserts that children would not have readily understood a sexual meaning in either broadcast. Moreover, it asserts that the "Kiddie Porn" song was perhaps offensive, not in language, but in subject, contending that "[t]he complainant likely objected to this song because he/she believed that it was improper to address the troubling issue of child pornography in a humorous tune." Evergreen Media maintains that the subjects of all these broadcasts -- homosexual activity, child pornography, and oral-genital contact -- are not taboo and that the language and context of raising these subjects in the cited broadcasts do not warrant an indecency determination.

8. Further, Evergreen Media describes the context of the show as an extemporaneous, frank, live and spontaneous, open forum, often humorous but never pandering or titillating, often discussing important public issues, and incorporating listener comments in over half of its dialogue (subject to WLUP's reasonable seven-second screenings). It urges that the merits of the "Steve and Garry Show" talkshow format, as conducted by WLUP, should weigh heavily against a Commission determination that the material was indecent or any Commission sanction against the station that would have a chilling effect. It maintains that the program is aimed at adults and would not be interesting to any but "the maturest" of minors; further, it contends that there is no showing that unsupervised children listen to the program, or that any harm would result if they did. According to the licensee, the degree of audience participation and the show's high ratings reflect the contemporary community standards in the Chicago area and establish that, in context, the broadcasts were not patently offensive by contemporary community standards, locally for Chicago (as further illustrated by its submission of supportive listener letters) or for broadcasting generally.

9. Evergreen Media also challenges the Commission's right to formulate an indecency standard based on anything other than a factual finding of local standards. In response to the NAL, it claims that proffered evidence of contemporary community standards for the Chicago area and evidence of merit should have been considered but were not. Moreover, it argues that the Commission's guidance in the area of indecency has been inadequate, that the Commission's precedent does not support a finding of indecency with respect to the broadcasts here at issue, and that the NAL fails to demonstrate that the material in the three broadcasts was indecent as broadcast.

10. Finally, Evergreen Media urges that since its decisions regarding the cited broadcasts were reasonable, good faith determinations under the circumstances, no fine should be imposed. It also urges that no sanction be imposed because these enforcement actions constitute a change in the Commission's regulatory course.

11. In *FCC v. Pacifica Foundation*, *supra*, the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and rejected the argument that the Commission's definition, essentially unchanged from the one used today, was unconstitutionally vague. Furthermore, in *ACT*, *supra*, the United States Court of Appeals upheld the Commission's authority to restrict, using the same definition of indecency, the broadcast of indecent material when there is a reasonable risk that children may be in the audience. In both these cases, our definition of indecency included a "contemporary community standards for the broadcast medium" component based on the Commission's asserted expertise in ascertaining such standards for the broadcast medium. This standard is not a local one, but rather, is the standard of an average broadcast viewer or listener. *See Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930, 933 (1987); *Sagittarius Broadcasting Corp.*, 5 FCC Rcd 7291 (MMB 1990). Further, the popularity of allegedly indecent broadcasts in any given community cannot vitiate an apparent violation of federal law, nor can it vindicate the Commission's legitimate and recognized interest in protecting children who may be in the listening audience. Moreover, the Commission is not required to make a specific factual determination that children were in the WLUP listening audience during the daytime broadcasts of the Steve and Garry Show. Rather, the courts have presumed that during the hours at issue here (2:30 p.m. to 5:10 p.m.), there is a reasonable risk that children may be in the general radio audience. Absent specific probative evidence in rebuttal -- evidence which Evergreen Media has not supplied -- this presumption remains valid. The broadcasts cited in this case are, therefore, legally actionable. *See ACT*, 852 F.2d at 1341 (recognizing the Commission's authority, pursuant to *Pacifica*, *supra*, to proceed against the daytime broadcast of indecent material using a "bright-line" test). Finally, it is well established that protecting children from exposure to indecent material is a compelling governmental interest and courts have not questioned or expected proof on the issue of harm. *See Sable Communications of California v. FCC*, 109 S.Ct. 2829, 2836 (1989); *Pacifica*, 438 U.S. at 749-50.

12. We find that all the broadcasts transcribed in Attachment 1 fit squarely within our definition of indecency stated above. Each of the passages describes sexual or excretory activities or organs -- specifically, oral-genital contact, sexual activity with a child, and anal intercourse. Contrary to Evergreen Media's contention, we do not rest our indecency determination on subject matter alone. Rather, we also find that each passage was presented in a manner or in terms that were patently offensive, as measured by contemporary community standards for the broadcast medium. The "Kiddie Porn" song was pandering in its descriptions of soliciting a young boy to pose nude and seducing him into homosexual activity. The

"gay bar" joke, within its brief sexual context, was explicit and vulgar in its depiction of anal intercourse. The March 30, 1989, broadcast, involving an allegedly "straightforward" description of sexual activities depicted in a magazine, was delivered by the talkshow host in explicit, graphic and vulgar language and was pandering and titillating in nature. While the broadcast's asserted character as political and social commentary would, if true, be a relevant contextual consideration in an indecency determination, it would not in itself be dispositive. As we stated, analogously, in *Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930, 932 (1987), "the merit of a work . . . is simply one of many variables" that make up a work's context; "we reject an approach that would hold that if a work has merit, it is *per se* not indecent" (footnote omitted). Even conceding, therefore, that the passage broadcast on March 30, 1989, possessed some redeeming value as social or political commentary, in the particular context of that broadcast, we find the explicit nature of the material and its manner of presentation to be patently offensive.

13. We also believe that the innuendo of the March 30, 1989, broadcast, as well as the innuendo and double entendre present in the August 19, 1987, broadcast of the "Kiddie Porn" song and the joke alluding to homosexual activity, was understandable and clearly capable of a specific sexual meaning, the import of which was inescapable. *See Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987), *recon.*, *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. ACT, supra*. Contrary to the argument of Evergreen Media, double entendre need not by its context be rendered capable of only one meaning -- a specific sexual one -- for broadcasts to fit within the Commission's definition of indecency; it is sufficient that the sexual (or excretory) meaning be clear and that it be presented in a patently offensive manner that exhibits all the elements spelled out in our definition of indecency. Furthermore, while indecency of a merely fleeting and isolated nature may in some instances be undeserving of a sanction, we are not persuaded that the material before us here, including the broadcasts involving listener participation, occurred in circumstances that can sustain such a claim. *Cf. Pacifica Foundation*, 2 FCC Rcd 2698 (1987) (dismissing complaint regarding "Shocktime, U.S.A." live broadcast).

14. A licensee's good faith conduct is no defense to a statutory violation for purposes of Commission enforcement action but may affect the sanction imposed. *Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 933 (1987), *aff'd in part and remanded in part sub nom. ACT, supra*. The Commission made it clear by its enforcement actions in 1987 that the kind of material before us here is actionable, and that licensees will be held responsible for erroneous good faith judgments which stray this far afield in their indecency determinations. We understand that the talkshow format may present unique problems and responsibilities for broadcasters, but we do not foresee its demise by the exercise of care to avoid, or screen out, indecent language.

15. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Evergreen Media Corporation of Chicago AM, licensee of Radio Station WLUP(AM), Chicago, Illinois, FORFEIT to the United States the sum of six thousand dollars ($6,000) for its violation of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENT 1

Transcripts, WLUP (AM), Chicago, IL

March 30, 1989, 5:10 p.m.
SD: Steve Dahl
GM: Garry Meier
BW: Bruce Wolfe

BW: He's (Bob Costas) trying to defend this Vanessa Williams. I mean she's a, the most embarassing pictures that you ever saw in your life in *Penthouse*. I don't know and he's talking about how she actually had more talent than your typical Miss America. I'll say.

SD: She was licking that other woman's vagina. I want to tell you pal.

GM: Isn't this great. We can all break into Jack Brickhouse at any moment.

BW: They chorus. But I mean, he's just offending her (unintelligible).

SD: Went down on that other woman and oh God, you had your tongue in her vagina. It was fabulous. A lot of your Miss Americas can. I don't picture Phyliss George being able to do it like that.

GM: More on later with Vanessa Williams. (Laughter)

BW: Show all these pictures of her right? They're getting increasingly suggestive. They show in that break.

SD: He had to put his leg up on the ottoman because he had a stiff-oh. God, I'm as hard as a rock right now Vanessa. You're so honest Bob.

GM: On the big chair.

BW: Oh, he's always dropping these references.

SD: He looks like he could (unintelligible). That chair's way too big.

August 19, 1987, 2:30 to 4:30 p.m.

C: Caller
SD: Steve Dahl
GM: Garry Meier

C: I want you guys to listen to my Cliff song and see if I'm on the right track, a little bit because I'm stumbling along with some of the lyrics, or, I have a.

SD: Why don't you pick what you think is your best.

C: OK, let's do this then because I want, I want to know if I'm on the right way. OK? You got to imagine Cliff singing this 'cause it's not that funny otherwise but, this parody to September Morn and we're going to call it Kiddie Porn. Here we go. (music)

> Welcome to my camp, you're a grown up little man, let me rub out that cramp, my, you've got a lovely hand, look at who you are and where you want to go, drop your drawers and strike a pose, my tripod's all aglow, it's Kiddie Porn. Do you remember when we filmed that hot summer day, you were nude and you discovered I was gay. Yes, I know but let's go roll out in the hay. (laughter in the background during song)

SD: That's pretty good.

GM: I think you should sing that. I think Cliff commissioned.

C: I was there.

SD: Pretty funny with you singing it.

* * * * * * *

C: I have a joke for you guys and think you can say it on the air. It's not real bad but do you know what the number one line in a gay bar is?

SD: What?

C: May I push your stool in for you?

SD: (laughs) Don't you think those guys have enough to deal with? We got AIDS and all that and then we're all naming gerbil jokes and stuff. I don't know.

FOOTNOTES

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[2] Section 503(b)(6) provides in pertinent part:

> No forfeiture penalty shall be determined or imposed against any person under this subsection if-- (A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred--
>
> (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or
>
> (ii) prior to the date of commencement of the current term of such license, whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice . . . .

47 U.S.C. § 503(b)(6).

[3] The licensee cites a footnote in *Dena Pictures, Inc.*, 90 FCC 2d 27, 42 n.23 [51 RR 2d 839, 850] (1982), to support its interpretation of Section 503(b)(6). That note, however, is clearly *dicta*, and its language is not a precise restatement of the limitations statute, particularly in its omission of any mention of a notice or NAL as a prerequisite to a forfeiture penalty in a prior license term. Among the numerous other cases that do not omit the notice or NAL prerequisite in discussing the limitations statute are *Deer Lodge Broadcasting*, 86 FCC 2d 1066, 1068 n.5 [49 RR 2d 1317, 1319] (1982); *Vinita Broadcasting Co.*, 30 FCC 2d 458, 461 n.8 [22 RR 2d 195, 210] (1971); and *Belk Broadcasting Co. of Florida*, 29 FCC 2d 150 [21 RR 2d 989] (1971).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-27

In the Matter of

Amendment of the Maritime Services Rules to permit both commercial and noncommercial communications on VHF channels 67 and 72 in the Puget Sound area	RM-6769

REPORT AND ORDER

Adopted: January 14, 1991; Released: January 29, 1991

By the Commission:

I. INTRODUCTION

1. In a *Notice of Proposed Rule Making* (*Notice*), released February 1, 1990, 5 FCC Rcd 609, the Commission proposed to amend Section 80.373(f) of the Rules, 47 C.F.R. § 80.373(f), to permit both commercial and noncommercial communications on very high frequency (VHF) channels 67 and 72 in the Puget Sound and Straits of Juan de Fuca. This Report and Order adopts the rule amendments as proposed.

II. BACKGROUND

2. The use of radio for communication between maritime vessels of all types has become increasingly important to promote safety as the number of vessels has increased. We estimate there are 20,000 noncommercial and commercial vessels operating in Puget Sound and the Straits of Juan de Fuca. There are currently six channels alloted for use by noncommercial vessels in these waters, one of which is for intership use only. In Puget Sound and the Straits of Juan de Fuca only one channel is available for both commercial and noncommercial use. The small number of channels available for noncommercial use and the increasing number of recreational and other maritime vessels has resulted in congestion on the marine VHF noncommercial channels. In a *Report and Order* in PR Docket No. 83-431, FCC 85-441, 50 FR 33942, (1985), we assigned channel 70 (156.525 MHz), which had previously been available for noncommercial use, for digital selective calling in accordance with international usage (RR No. 4681A). This action, while necessary, nevertheless exacerbated the shortage of noncommercial channels.

3. To provide some relief to noncommercial users we proposed in a *Notice of Proposed Rule Making* in PR Docket No. 88-350, 3 FCC Rcd 4288 (1988), to make VHF channels 79 and 80 available for noncommercial as well as commercial use on a nationwide basis. In light of the comments, however, we determined that nationwide sharing on these two channels was not in the public interest because local conditions vary. Accordingly, we authorized sharing in that proceeding on VHF channels 79 and 80 in the Great Lakes area only, the original area requested by the petitioner. We indicated, however, that we would consider sharing in other areas on a case-by-case basis.[1]

4. The North Pacific Marine Radio Council (NPMRC) filed a petition for rule making (RM-6769) on April 27, 1989, Public Notice Report No. 1781 dated June 2, 1989. In its petition, NPMRC asked the Commission to amend Section 80.373(f) of the Rules to permit both commercial and noncommercial communications on VHF channels 67 and 72 in the Puget Sound and the Strait of Juan de Fuca. We agreed with NPMRC and proposed amending the Rules as requested. NPMRC filed comments in response to the *Notice* supporting the proposed rule amendments and suggested they be extended to include the waters offshore of Alaska. No other comments were filed. No reply comments were filed.

III. DISCUSSION

5. In support of its request, NPMRC notes the growing number of vessels in the area. NPMRC argues that as the number grows the ability to communicate between ships (both commercial and non-commercial) becomes even more important.[2] Under the current rules, however, there is only one VHF channel (channel 9) that can be used by both commercial and noncommercial vessels in the Puget Sound area. NPMRC states that this frequency is heavily used by commercial vessels. NPMRC proposed to allow both commercial and noncommercial communications on channel 67, currently restricted to commercial intership communications, and channel 72, currently restricted to noncommercial intership communications. This, it argues, would provide three channels for both commercial and noncommercial intership communications to be used by vessels operating in Northwest Washington waters. NPMRC points out that such channel usage is consistent with channel usage in adjacent Canadian waters that vessels in the area routinely navigate. NPMRC states that it has discussed its proposal with marine radio users and government officials in the Puget Sound area and in Canada and they are supportive of the idea.

6. As indicated in PR Docket 88-350, we support regional sharing of commercial/noncommercial VHF marine channels to reduce congestion on maritime frequencies where feasible. In this case, allowing both commercial and noncommercial vessels to use these two channels should reduce congestion and thus increase boating safety in the area. Further, such sharing is supported by the marine radio users in the area and the channel usage is consistent with channel usage in adjacent Canadian waters. For these reasons, we are adopting a rule to permit shared use of channels 67 and 72 in the Puget Sound and the Strait of Juan de Fuca.

7. In its comments, NPMRC suggests that the Commission extend the scope of these amendments regarding commercial and noncommercial communications on VHF channels 67 and 72 to the waters offshore of Alaska.[3] While there may well be merit in NPMRC's request concerning Alaskan waters, there is no indication in its comments that this matter has been extensively coordinated in Alaska or in Canada. Further, no reply comments were received addressing the question. As a result, we regard the question of shared use of channels 67 and

72 in Alaskan waters to be beyond the scope of this proceeding. We would be willing, however, to revisit the Alaskan question in a future proceeding.

IV. PAPERWORK REDUCTION ACT STATEMENT

8. The action herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or recordkeeping, labeling, disclosure, or record retention requirements, and will not increase or decrease burden hours imposed on the public.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i) and 303(r) of the Communication Act of 1934, as amended, Part 80 of the Commission's Rules, 47 C.F.R. Part 80, IS AMENDED, as set forth in the Appendix below.

10. IT IS FURTHER ORDERED, that these rule amendments shall become effective on **March 11, 1991.**

11. IT IS FURTHER ORDERED that a copy of the *Report and Order* be sent to the Chief Counsel for advocacy of the Small Business Administration.

12. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 80 - Stations in the Maritime Services

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303 48 Stat. 1066, as amended, 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In § 80.373, paragraph (f) is amended by adding a new frequency to the commercial and noncommercial tables and adding a new footnote to read as follows:

§ 80.373 Private communications frequencies

* * * * *

(f) * * *

* * * * *

Commercial

* * * * *

72[14]. . . .	156.625	. . . . . Intership only

* * * * *

Noncommercial

67[14]. . . .	156.375	. . . . . .Intership only

* * * * *

[14] Available only in the Puget Sound and the Strait of Juan de Fuca.

* * * * *

FOOTNOTES

[1] Report and Order, PR Docket No. 88-350, 4 FCC Rcd 1637 (1989).

[2] For example, sailboats must frequently talk to commercial vessels during races. Vessels also routinely exchange information on weather and sea conditions.

[3] *See* NPMRC Comments at 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-634

In re Applications of

Oasis Radio Affiliates, Inc. (hereafter "Oasis")	File No. BPH-881215MH
AB Partners, Ltd. (hereafter "AB")	File No. BPH-881215MI
Kathleen D. Walker (hereafter "Walker")	File No. BPH-881215ML
BEBE-F Broadcasting Corp. (hereafter "BEBE")	File No. BPH-881215NE
Baker Communications Partnership (hereafter "BCP")	File No. BPH-881215NN
Bear Broadcasting of Louisiana, Inc. (hereafter "Bear")	File No. BPH-881215NP
Rupert of East Baton Rouge Broadcasting L.P. (hereafter "Rupert")	File No. BPH-881215NQ
RDH Communications, Limited Partnership (hereafter "RDH")	File No. BPH-881215NG (HEREIN DISMISSED)

For Construction Permit
for a New FM Station on
Channel 297A (107.3 MHz)
in Baker, Louisiana

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *RDH*. RDH's application (Form 301) lacked Sections III (financial) and IV (programming). Although RDH attached an exhibit describing its planned programming service as called for in Section IV, an examination of its application fails to reveal the certification of sufficent net liquid assets called for in Section III. Since that certification is absent, RDH's application is untenderable and was inadvertently accepted. Accordingly, it must be dismissed. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, (May 13, 1985).

3. *Oasis*. Alan H. Potamkin, a principal of Oasis, has an ownership interest in the following non-communications entities, against which have pending complaints alleging equal employment opportunity (EEO) violations: (i) *Thomas Gilmore v. Potamkin Chevrolet* (Philadelphia)-EEOC-Charge No. 170890020, October 12, 1988; (ii) *Eva Sieberling v. Potamkin Auto Mall* (Philadelphia) Philadelphia Commission on Human Rights - Charge No. 17G890035, October 19, 1988; (iii) *Gale L. Schuber v. Potamkin Ford* (Atlanta) - EEOC August 17, 1987 - U. S. District Court for the Northern District of Georgia (Atlanta Division) - Case No. 1:88-CV-952-LV, April 29, 1988; and, (iv) *Raymond Angulo v. Potamkin Toyota* (Miami) - Metro Dade Co. Fair Housing and Equal Opportunity Appeals Board - EEOC - Charge No. 150890127, October 24, 1988. An appropriate condition will therefore be specified below.

4. *AB*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although AB has filed such a statement, it is deficient. AB has not listed employment services which refer job candidates without regard to race, color, religion, national origin, or sex. Accordingly, AB will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. *BCP*. BCP asserts that the Federal Aviation Administration determined that, although its proposed tower does not otherwise constitute a hazard to air navigation, that agency ruled that the proposed facilities would cause harmful electromagnetic interference (EMI) to aircraft receivers. BCP argues that the FAA's conclusion constitutes a disruptive "intrusion" into the FCC's domain. Although it is willing to amend to specify an alternate site, BCP asserts that another site is less desirable. Thus, it requests a declaratory ruling from the Commission that a site change on the basis of EMI alone is not required.

6. The question of air hazard determinations based on FAA objections regarding potential EMI are the subject of current, ongoing negotiations between the FCC and FAA. *See Letter from former Commission Chairman Dennis R. Patrick to Secretary of Transportation Samuel K. Skinner*, March 13, 1989. Until such time as there is an agreement between the agencies concerning the harmful effects of EMI to aircraft navigation equipment, the policy of the FCC is to specify an air hazard issue absent clearance of a proposed site by the FAA. Thus, an air hazard issue will be specified as to BCP.

7. *Rupert*. Rupert indicated in an amendment filed on September 28, 1990, that its limited partner and 37.5% owner, Hubert Payne, has been indicted for alleged viola-

tions of 18 U.S.C. § 371 (conspiracy to launder money) and 18 U.S.C. § 1956 (money laundering). *See U.S. v. Frank Coyle, et al.*, No. 1:90 CR-0187 (N.D. Ohio, filed July 24, 1990). An appropriate condition will therefore be specified below.

8. The following applicants petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Oasis	July 3, 1989
BCP	April 26, 1989
Rupert	September 28, 1990

9. Bear petitioned for leave to amend its application on November 13, 1989, after the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by BCP would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That RDH's application IS DISMISSED as inadvertently accepted for tender.

14. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to Oasis as a result of this proceeding, its grant will be without prejudice to whatever action, if any, the Commission deems appropriate in light of the outcome of the complaint proceedings outlined in paragraph 3 above.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, AB shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to Rupert as a result of this proceeding, its grant whall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of the outcome of *U.S. v. Frank Coyle, et al.*, No. 1:90 CR-0187 (N.D. Ohio, filed July 24, 1990).

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Oasis, BCP, Bear, and Rupert ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That the Request for Declaratory Ruling submitted by Baker Communications Partnership IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-636

In re Applications of

THE MIRKWOOD GROUP (hereafter "Mirkwood")	File No. BPH-890412MH
BRUCE M. LYONS (hereafter "Lyons")	File No. BPH-890413MD
CAROLE L. PICKETT (hereafter "Pickett")	File No. BPH-890413MO
LEWIS CREEK BROADCASTERS, LTD. (hereafter "Lewis Creek")	File No. BPH-890413NA
BACH 'N ROLL RADIO OF BRANDON, INC. ("Bach 'n Roll")	File No. BPH-890413NG
JAMES G. KIRKPATRICK (hereafter "Kirkpatrick")	File No. BPH-890413NI
GREEN MOUNTAIN BOYS BROADCASTING (hereafter "Green Mountain")	File No. BPH-890413NM (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on Channel 270A
in Brandon, Vermont

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* A preliminary examination of these applications revealed that the entire allocation for Channel 270A at Brandon, Vermont is short-spaced to the pending Rule Making in MM Docket No. 89-487, RM-6855. In the *Notice of Proposed Rule Making* in MM Docket No. 89-487, the Commission, at the request of Stokes Communications Corporation, proposed the substitution of Channel 271C3 for Channel 272A at Randolph, Vermont. The *NPRM* also proposes to substitute Channel 268A for the current Channel 270A at Brandon. Therefore, while the applicants will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 89-487.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. *Air hazard.* Attempts to obtain Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and applicants Mirkwood and Lyons have been unsuccessful. Accordingly, since no determination has been received as to whether or not the antennas proposed by the applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Financial Qualifications.* The material submitted by Kirkpatrick does not demonstrate its financial qualifications. Accordingly, an issue will be specified concerning the following deficiency: an answer of "no" to Items 1 and 2, Section III, FCC Form 301 (April 1985), certifying that it does not possess the financial resources to construct and operate the station.

6. *Return of Late-filed Amendment.* Lewis Creek filed, on August 25, 1989, an engineering amendment after the last date to file an amendment as of right. Lewis Creek fails to submit any good cause for the lateness of its filing. Therefore, the amendment filed shall be returned. *See* 47 C.F.R. § 73.3577(a)(6).

7. *Late-filed Amendment.* Lyons petitioned for leave to amend its application on November 16, 1989. Bach 'n Roll petitioned for leave to amend its application on July 23, 1989 and September 9, 1990. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. *Lyons.* On June 20, 1990, Susan E. Marcotte ("Marcotte") filed an informal objection to Lyons' application. Since the matters raised in the objection have previously been filed in a pending transfer proceeding involving stations WSHQ(FM) (File No. BTCH-891122HE), Cobleskill, New York and WYNJ(FM) (File No. BTCH-891122HF), Rotterdam, New York, in the event of grant of the instant application, it shall be without prejudice to whatever action may be appropriate in light of the ultimate resolution of the issues sought in the Rotterdam, New York and Cobleskill, New York proceeding that are not specified herein.

9. In addition, in MM Docket 90-73, Lyons was the subject of a "real party-in-interest" issue added by the presiding Administrative Law Judge concerning the ap-

plication of Maxine W. Snow (BPH-880125NX). The merits of the issue were never addressed, but was framed as follows:

> To determine whether Bruce Lyons is an undisclosed party-in-interest in Maxine Snow's Lebanon, New Hampshire FM application (BPH-880126NX), in comparative proceeding MM Docket 90-73, and if so, what effect that has on Snow's qualifications to be a Commission licensee.

10. Maxine Snow subsequently dismissed her application as part of a settlement reached in that proceeding. This unresolved issue calls into question Lyons' qualifications to be a Commission licensee. Therefore, since the issue was unanswered, it was specified and will be tried in the hearing involving Walpole, Massachusetts. *See Hearing Designation Order* in MM Docket No. 90-421, DA 90-1217, released October 3, 1990. Therefore, this issue will not be specified in this proceeding. However, any grant of Lyons' application will be conditioned to the outcome of the Rotterdam/Cobleskill and Walpole proceedings. Additionally, should Lyons dismiss his Walpole application, the issues raised in the *Hearing Designation Order* in MM Docket 90-421 which raised substantial and material questions of fact regarding Lyons's qualifications to be a Commission licensee, would remain unresolved. Therefore, a *contingent* issue will be specified against Lyons.

11. *73.207.* Green Mountain indicates that it is short-spaced to FM broadcast stations WENU(FM), Hudson Falls, New York and WJIV(FM), Cherry Valley, New York by 9.09 km and 2.15 km, respectively. However, while it requests a waiver of Section 73.207 of the Commission's Rules, the applicant provides no rationale whatever to support this request. Further, its proposal must be judged in light of the five other fully-spaced proposals for this Brandon allotment.

12. When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644 (D.C. Cir. 1968). Green Mountain provided no basis whatever for its waiver request, and the request can and will be denied on that basis alone. However, we should also point out that Commission policy at the time these applications were filed did not permit waiver of the mileage separation requirements of the magnitude requested here unless no fully spaced or lesser short-spaced site exists. *See Donovan Burke*, 104 FCC 2d 843 (1986). Here, any argument that no such site is available is negated by the fact that five other aplicants propose fully-spaced sites.[1]

13. *Pledge to divest.* Carole Pickett has indicated that she has attributable interests in WHWB-AM and WHWB-FM, Rutland, Vermont. These stations are close enough in proximity to Brandon that Pickett's ownership interest in these stations would violate the Commission's cross-interest policy (with respect to WHWB-AM) and duopoly (with respect to WHWB-FM) rules. Consequently, she has indicated that in the event of grant of the instant construction permit application, she would divest herself of her interest in the stations noted above. Accordingly, in the event of Pickett's application, Pickett will be required to sever all connections with and divest herself of all interest in the noted stations prior to the commencement of program test authority.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by Mirkwood and Lyons would constitute a hazard to air navigation.
>
> 2. To determine with respect to Kirkpatrick whether the applicant is financially qualified.
>
> 3. If Lyons dismisses his application for Walpole, Massachusetts, (BPH-881216NT) prior to resolution of Issues 1 and 2 in MM Docket 90-421, whether Lyons was an undisclosed real party-interest in Maxine Snow's application (BPH-880126NX) in the Lebanon, New Hampshire proceeding, MM Docket 90-73, and, if so, the effects thereof on Lyons' qualifications to be a licensee of the facilities sought herein.
>
> 4. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That grant of any application in this proceeding shall be contingent on the outcome of MM Docket 89-487.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That Green Mountain's request for waiver of 47 C.F.R. § 73.207 IS DENIED, and its application IS DISMISSED as inadvertently accepted for filing.

19. IT IS FURTHER ORDERED, That Lewis Creek's August 25, 1989 amendment IS RETURNED.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lyons and Bach 'n Roll ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the informal objection filed by Marcotte on June 20, 1990, is hereby GRANTED to the extent indicated herein and DENIED in all other respects.

22. IT IS FURTHER ORDERED, That in the event of grant of Lyons' application, the grant shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of the matters specified in paragraph 8.

23. IT IS FURTHER ORDERED, That in the event of the grant of Pickett's application, Pickett will be required to sever all connections with and divest herself of all

interest in radio stations WHWB-AM and WHWB-FM, Rutland, Vermont, prior to commencement of program test authority.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner presecribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Green Mountain has not raised any question regarding the suitability of the fully spaced sites proposed by any other applicant here. *See, e.g.*, 47 Fed. Reg. 47,931 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-631

In re Applications of

WASHINGTON INTERSTATE BROADCASTING COMPANY, INC. (hereafter: WIBC)	File No. BPH-881215ME
CLARE E. MAROHN (hereafter: Marohn)	File No. BPH-890112MD
ARMAK, INC. (hereafter: Armak)	File No. BPH-890112MQ
CLARK R. HARMON (hereafter: Harmon)	File No. BPH-890112MX

For Construction Permit
for a New FM Station on Channel 233A
in Kelso, Washington

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 28, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* On August 6, 1990, Marohn filed a "petition to deny" ("petition") the application of WIBC. Marohn's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

3. *Harmon.* Harmon has submitted a site availability certification which states that he has obtained, through a consultant, reasonable assurance of an available site by contacting the Columbus County (Washington) School District No. 13-5. However, Exhibit VII to Harmon's application states that the subject land is up for sale and that the applicant is "gathering additional information to obtain absolute assurance as to its availability." The Commission has held that although an applicant need not have a binding agreement or absolute assurance of the availability of its proposed site, an applicant must show that it has obtained reasonable assurance that the proposed site is available. "The Commission's requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose." *Report and Order* in MM Docket No. 84-750, 50 Fed.Reg. 19936, 19939-40 (1985). Given the confusion as to the availability of the site in question, a site availability issue will be specified against Harmon.

4. Harmon failed to respond to Item 17, Section V-B of FCC Form 301 (October 1986), which requests data relative to areas and populations. Accordingly, Harmon will be required, within 30 days of release of this Order, to submit this information to the presiding Administrative Law Judge.

5. *Other Matters.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Armak have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Armak would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Harmon has reasonable assurance that the transmitter site specified will be available to the applicant.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Armak would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Marohn's petition to deny WIBC's application IS DISMISSED.

10. IT IS FURTHER ORDERED, That Harmon shall submit an amendment which contains the information required by Section V-B, Item 17, Form 301 (October

1986), in accordance with paragraph 4 herein, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-607

In re Applications of

COLUMBIA BIBLE COLLEGE BROADCASTING CO. (hereafter CBCB) Monroe, North Carolina	File No. BPED-850618ME
WINGATE COLLEGE (hereafter Wingate) Wingate, North Carolina	File No. BPED-851108MA
INSPIRATIONAL DELIVERANCE CENTER, INC. (hereafter IDC) Monroe, North Carolina	File No. BPED-851108MB

For Construction Permit For a New
Noncommercial Educational FM Station
on Channel 204A

HEARING DESIGNATION ORDER

Adopted: November 20, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial educational FM ("NCE-FM") station.

PRELIMINARY MATTERS

2. *Petition to Deny*. On August 29, 1986, CBCB filed a "Petition to Deny and Dismiss" IDC's application because IDC has failed to show that it "contemplates or is capable of providing an educational broadcast service," as required by Section 73.503(a)(2) of the Commission's rules. Further, CBCB says that IDC is not accredited by an appropriate agency nor has it sought such accreditation. Finally, CBCB says that IDC is not financially qualified to construct and operate a station. This is because, while IDC claims to be financially dependent upon a grant from the National Telecommunication Information Administration (NTIA), petitioner states that NTIA, pursuant to the Public Telecommunications facilities Program, is precluded from funding IDC because applicant, to be elegible, cannot be "primarily religious." *See* 15 C.F.R. § 2301.5(a)(5).

3. On September 16, 1986, IDC filed a "Motion to Strike or Dismiss" the petition, stating that CBCB's allegations were procedurally defective and constituted an unauthorized pleading. It went on to say that CBCB's allegation concerning IDC's financial qualification and elegibility to be a non-commercial licensee were, in effect, pre-designation petitions to specify issues against IDC. "Such pleadings no longer are authorized under Commision procedures for processing applications." *Revised Procedure for the Processing of Contested Broadcast Applications*, 72 FCC 2d 202 (1979); *Seven Locks Broadcasting Company*, 94 FCC 2d 899, 900 (1983). Lastly, IDC says that CBCB is not a party in interest because its application has been returned. The thrust of the motion to strike is procedural in that IDC does not respond on point to any of the points which CBCB makes in its petition.

4. On October 9, 1986, CBCB filed an "Opposition to Motion to Strike or Dismiss." CBCB says that it clearly is a party in interest and, at the very least, its pleading should be considered as an informal objection. The balance of the opposition mirrors allegations stated in the petition to deny.

5. *Standing*. IDC claims that CBCB has no standing to file a petition because, since its application had been returned, "CBCB simply is not a mutually exclusive applicant . . . Although it concurrently resubmitted its application and requested *nunc pro tunc* reinstatement, CBCB cannot be considered an applicant mutually exclusive with IDC unless and until its request. . . is granted." On January 22, 1988, CBCB's petition for reconsideration and acceptance *nunc pro tunc* was granted. *See* Letter from the Chief, FM Branch, reference 8920-DEB. Therefore, we find that CBCB is a "party-in-interest" to the instant proceeding, and we will treat the August 24, 1986 pleading as a formal petition to deny under 47 U.S.C. § 309(d) and C.F.R. § 73.3584. Additionally, we believe that the petition raises a potentially disqualifying issue, namely, whether or not IDC qualifies under the Commission's Rules to be the licensee of a noncommercial educational broadcasting station. If the issue is resolved against IDC, its application will be dismissed. Therefore, we will decide the issue prior to hearing.

6. The Court of Appeals for the District of Columbia Circuit, in a recent line of cases here controlling, clarified and reaffirmed the Commission's statutorily prescribed two-step process for judging the sufficiency of a petition to deny.[1] Consequently, it is well established that in order to obtain an evidentiary hearing, the proponent of a petition to deny must first set forth specific allegations of fact sufficient to show that "a grant of the application would be *prima facie* inconsistent with the public interest, convenience and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, the Commission must determine whether "on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented." 47 U.S.C. § 302(d)(2). If not, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 294 (D.C. Cir. 1985).

7. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone; the Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communica-*

tions Company v. FCC, 857 F.2d 1556 (D.C. Cir. 1988). CBCB's allegations establish an apparent violation of the Commission's licensing requirements for noncommercial educational FM broadcast stations Rule, found at 47 C.F.R. § 73.503.

8. After consideration of the petitioner's allegations, as required under 47 U.S.C. § 309(d)(1), we are persuaded that the assumed rule violation, standing alone, is sufficient to establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *See, e.g., Banks Broadcasting Company*, FCC 85-122, Slip op. (rel. April 4, 1985, adopted March 14, 1985); *Kist Corporation*, 99 FCC 2d 173, 57 RR 2d 49 (1984); *Julie P. Minor (KDXU)* 51 FCC 2d 1163, 33 RR 2d 159 (Rev. Bd. 1975). *See also Catoctin Broadcasting Corporation of New York*, 2 FCC Rcd 2126, 2178; 62 RR 2d 1132, 1149 (Rev. Bd. 1987). In this regard, we note that the petitioner's allegations indicate that an organization which has a purpose that is not predominantly *educational* is seeking to operate on a channel reserved for noncommercial educational stations.

9. Having found that the petition comports with the requirements set forth in 47 U.S.C. § 309(d)(1), *i.e.*, to plead specific facts, which, if assumed true, show that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity, we now reach the question of the substantiality or materiality of the facts presented. 47 C.F.R. § 503 states that a noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization upon a showing that the station will be used in the advancement of an educational program. In applying this rule section, FCC Form 340 asks for, and the Commission looks to see, whether: (i) there is an overall educational program proposed for the station; and (ii) the proposed programs evidence a commitment to advance the educational goal. *See Seattle Public Schools*, 103 FCC 2d 862 (1986), and *Way of the Cross, Inc.*, 101 FCC 2d 1368 (1985). In *Way of the Cross*, the Commission overruled *Bible Moravian Church, Inc.*, 28 FCC 2d 1 (1971) and made clear that noncommercial educational organizations, even though religiously-oriented, can qualify upon an appropriate showing for licenses on reserved channels. The Commission stated:

> It is this point we wish to make clear. [The] Bureau stated on reconsideration of the Way/Utah proceeding, "over the years, the Commission has articulated the principle that organizations which are primarily religious in nature, even though they have some educational aspects, will not be allowed to operate on channels reserved for educational use." This statement was clearly in error. We therefore agree fully. . . that "applicants for reserved channels may not be dismissed *simply* because they propose religious instructions." (Emphasis supplied). Religiously oriented applicants for reserved. . . channels can meet the requisite eligibility standards. 10 FCC 2d at 1374, note 8.

10. In addressing the arguments raised by CBCB, we examined several elements: IDC's Articles of Incorporation and by-laws to determine whether or not the applicant proposes an overall educational program; and (ii) its proposed programming statement to determine if it furthers these educational objectives. We believe that IDC has demonstrated its qualifications to be a noncommercial educational FM license under Section 503 of the rules. Article V of IDC's articles of incorporation states that the corporation is organized "to operate exclusively for religions, charitable, educational and distinct ecclesiastical purposes . . . ." Amoung these purposes are "spread[ing] the word of God through seminars, radio, television, establishment of church literature and other forms of Mass Media" and "[e]stablishing a Bible Training School of Theology . . . for the preparation of ministers." Articles of Incorporation, Article V, (b)(vi) and (viii). These sentiments are echoed in the corporation by-laws at p. 3, and in Exhibit 4, the statement of purposes and objectives. Similarly, Exhibit 5, IDC's proposed program schedule, evidence a commitment to advancing these purposes. While admittedly these purposes and programs are geared to religious instruction (see Exhibit 6 of the application, "Proposed Facilities and Resources"), the Commission has stated that it will not disqualify any program simply because the subject matter of the teaching or instruction religious in nature. It is recognized that, while not all religious programs are educational in nature, programs which involve the teaching of matters relating to religion would qualify. Accordingly, IDC has satisfied requirements of Section 503(c) and CBCB's petition will be denied.

11. *Wingate Petition for Reconsideration.* On August 28, 1986, the day before the deadline for filing amendments as of right in the instant proceeding,[2] Wingate filed an amendment to its application changing the proposed transmitter location, power, and antenna height. This amendent caused mutual exclusivity between Wingate's application and those of South Carolina Radio Fellowship (SCRF) (File No. ARN-860808MB) for a new noncommercial educational FM station in Florence, South Carolina, and Fayetteville State University (WFSS) (File No. BPED-860811MF) for a modification of the facilities of its station WFSS(FM), Fayetteville, North Carolina. Neither the SCRF nor WFSS application was filed prior to the November 8, 1985 filing deadline for applicants mutually exclusive with the Wingate application, [3] and on June 26, 1987, the SCRF application was returned. SCRF filed a petition for reconsideration on July 24, 1987.

12. By letter of October 14, 1988, the Chief, Audio Services Division, granted SCRF's petition and reinstated its application, and returned Wingate's August 28, 1986 amendment. This was done because: (i) the *Kittyhawk* doctrine[4] which was the basis for the return of SCRF's application involved a "daisy chain" created by the filing of a mutually exclusive *application*, not the (albeit timely) filing of a technical *amendment*; (ii) SCRF and WFSS protected all Monroe/Wingate applicants when they filed, thus anticipating the very possibility which the Ellettsville applicant in *Kittyhawk* did not; and (iii) while the *Kittyhawk* policy is necessary to insure finality in "daisy chain" proceedings, we were "both hesitant to extend it to situations where the mutual exclusivity was caused by later amendment and unaware of any case in which we have so held." Additionally, we noted that the Commission has, to the extent possible, extended the AM processing rules and policies to noncommercial educational FM applicants, since both services are licensed as a "demand" rather than a channel-allocation basis. (Hence, the Commission applied *Kittyhawk*, an AM case, in the present case). 47 C.F.R. § 73.3571(j)(i) indicates that an engineer-

ing amendment to an AM application will require a new file number "unless such amendment would not involve new or increased interference problems with . . . other applications pending at the time the amendment is filed." Therefore, since that principle serves to insure "finality," as does the *Kittyhawk* doctrine, it applied to the present case and the Wingate amendment was returned. On December 19, 1988, Wingate filed a petition for reconsideration.[5]

13. In its petition for reconsideration, Wingate states that: (i) allowing a later-filed application to take precedence over an earlier applicant whose right to amend is protected is impermissible under current NCE-FM rules; (ii) when the NCE-FM rules are clear and unambiguous as is 47 C.F.R. § 73.3522(a)(2), it is improper to apply a rule from the AM commercial broadcast services merely to achieve a desired result; (iii) even if it is appropriate to apply the AM rule, it is inappropriate to apply such rule retroactively to Wingate and in so doing the commission violated the Administrative Procedure Act; (iv) Wingate had no notice of how to file a fault-free amendment, since it was unforseeable that the Commission would abandon its current processing rules or amendments to "reach a convenient result"; (iv) on the other hand, it was forseeable by SCRF and WFSS that a mutually exclusive applicant might file a minor technical amendment before the "B" cut-off date; and (vi) the Division's action disserves the public interest because it both deprive Wingate residents of increased service and denies applicant Wingate comparative rights under *Ashbacker Radio Corp. v. FCC*, 326 US 732 (1945), which mandates consideration of Wingate's amended application. Each of these arguments will be considered in turn.

14. We believe that the return of the Wingate amendment was appropriate. Here, acceptance of the Wingate amendment would lead to two possible results, each of which would contravene an established policy. First, acceptance of Wingate's amendment could lead to the Post "A" date addition of SCRF and WFSS to the Monroe/Wingate mutually exclusive proceeding. As stated in the Commission's October 14 letter, "[w]e do not believe that the 'amendment as of right' privilege accorded by our processing rules should allow a cut-off mutually exclusive group of applicants to be enlarged after the 'A' cut-off date. Such a cause of action would thus undercut 'finality,' the very essence of the cut-off processing system." The second possible consequence of accepting Wingate's August 28 amendment is the return or dismissal of the SCRF and WFSS applications.[6] This result is unacceptable because, as stated in the October 14 letter,

> In *Kittyhawk*, the intervening "daisy chain" was caused by the filing of a mutually exclusive *application* which the Commission held the returned applicant should have foreseen. Here, the mutual exclusivity between Wingate and both SCRF and WFSS was caused by Wingate's (albeit timely) technical *amendment*. Both SCRF and WFSS clearly protected all Monroe/Wingate applicants as originally filed and cut-off; thus, these two applicants anticipated the very possibility which the Ellettsville applicant in *Kittyhawk* did not. When no intervening application was filed, SCRF and WFSS later filed their respective applications (footnote omitted).

15. Thus, to accept Wingate's argument would require the Commission to extend *Kittyhawk* retroactively (to the fatal detriment of SCRF and WFSS) to a situation which was previously permissible. While the *Kittyhawk* doctrine is necessary to insure finality in "daisy chain" proceedings, as we stated in our October 14 letter, we will not extend it to situations where the mutual exclusivity was caused by later amendment.

16. Wingate claims that the rejection of its amendments violated Section 4 of the Administrative Procedure Act ("APA") because Wingate "had no notice before being stripped of its rights to a comparative hearing, which enured because of the cut-off rules grant of perfecting rights." Petition, at 12. Thus, Wingate claims, the return of the amendment was not a procedural matter governing the time and order in which applications will receive consideration, but a substantive matter governing the eligibility for filing applications and amendments and thus required a formal rule-making. Wingate also claims that it had no notice of how to file a fault-free amendment, as it had no indication that the Commission would abandon its current processing rules. Thus, it asserts, the Commission's failure to follow its own rules[8] voids the return of Wingate's amendment.

17. Essentially, Wingate claims here that: (i) the application of Commission procedural rules which led to the return of its amendment had a substantive effect on its hearing rights and thus needed a full notice and comment Rule Making when the APA; and (ii) the deviation from 73.3522, which give Wingate the right to file its August 28 amendment, voided that return. We disagree with each of these contentions.

18. The APA requires that the Commission allow an opportunity for notice and comment before promulgating rules other than those "of agency organization, procedure, or practice." *See* 5 U.S.C. § 553(b).[9] The APA further requires that "substantive" rules should be made public at least 30 days before their effective date. 5 U.S.C. § 553(d). While courts have not had an easy time in determining whether particular agency rulings were "procedural" or "substantive", the following discussion is useful:

> "'Procedure' and its opposite, 'substance,' are not talismanic labels or given premises. Rather, they are legal conclusions which depend upon their settings for definition." *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979). "A useful articulation of the exemption's critical feature is that it covers agency action that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency." | *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980)|. *See also National Association of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205, 103 S.Ct. 1193, 75 L.Ed.2d 483 (1983) (APA exemption from the notice and comment requirement does not apply to agency action which has a substantial impact on substantive rights and interests). It still remains, however, to identify the "substantive rights and interests" that may not be altered without prior opportunity for notice and comment. Certainly not every interest so qualifies, since every change in rules will have some effect on those regulated. *See Batterton*, 648 F.2d at 707. In determining whether a rule is substantive,

> we must look at its effect on those interests ultimately at stake in the agency proceeding. *See, e.g., Pickus v. United States Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974) (parole board guidelines were substantive because they "were the kind calculated to have a substantial effect on the *ultimate* parole decisions") (emphasis supplied).

Neighborhood TV Co., Inc. v. FCC, 742 F.2d 629, 637 (D.C. Cir. 1984). *See also Ranger v. FCC*, 294 F.2d 240 (D.C. Cir. 1961)(Procudural requirements may and occasionlly do affect substantive rights, but such possibility does not make a procedural requirement substantive).

19. We believe that, while our October 14 ruling does affect Wingate's right to better its comparative position, it does not affect the interest ultimately at stake in the Monroe/Wingate proceeding. However, extension of the Kittyhawk policy to SCRF and WFSS *extinguishes* their ultimate interest, namely, the provision of broadcast service to their respective communities.

20. With respect to the Commission's alleged deviation from the NCE-FM processing rules, we must point out that a strict adherence to the rule would require either an extension of *Kittyhawk* beyond that currently contemplated or undercutting altogether the finality concept which generated *Kittyhawk*. As the Court of Appeals for the District of Columbia Circuit has written:

> There is a "general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business when in a given case the ends of justice require it." *American Farm Lines v. Black Ball Freith Service*, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970) (quoting *National Labor Relations Board v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (3th Cir. 1953)); *see also Health Systems Agency v. Norman*, 589 F.2d 486 (10th Cir. 1978) (court found HEW abused its discetion by refusing to waive a filing deadline where application was 55 minutes late for justifiable reasons). *Lyman v. United States*, 500 F.2d 1394, 1396 (Temp. Emer. Ct. of App. 1974) (excusing Price Commission failure to get comments from a local agency as required by its rules). "Whether or not [a Commission's] discretion has been soundly exercised will, of course, *depend on the circumstances of the case* as reviewed by the Commission." *Municipal Electric Utility Association v. Federal Power Commission*, 485 F.2d 967 (D.C. Cir. 1973) (emphasis supplied).

Neighborhood TV Co. Inc., 742 F.2d 629, 636 (D.C. Cir. 1984). We believe that "the order of justice" here clearly requires that the Wingate amendment be returned in order that the SCRF and WFSS applications can be processed. Any deviation from the processing rules is amply supported by the October 14 letter.

21. Wingate also claims that the Commission's action disserves the public interest because it deprives Wingate residents of increased service and denies applicant Wingate's comparative rights under *Ashbacker, supra*. We disagree. This comparative proceeding involves two applicants for Monroe, North Carolina, and one applicant for Wingate, North Carolina, and therefore an issue must be specified under 47 U.S.C. § 307(b) regarding which proposal best promotes a fair, efficient and equitable distribution of radio service. Thus, there is no guarantee that: (a) the town of Wingate will prevail in the 307(b) consideration; or (b) applicant Wingate will ultimately prevail at hearing. The Commission's return of Wingate's amendment can hardly be said to "deprive the residents of Wingate of service [from] Wingate's 40 kW operation," see petition, at 16.[10] Additionally, Wingate's reliance on *Ashbacker* is misplaced. The Supreme Court of the United States held there simply that "where two *bona fide* applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him [in 47 U.S.C. § 309(a)]." *Ashbacker, supra*, 326 U.S. at 333. Nowhere does *Ashbacker* mandate consideration of Wingate's amendment, and in fact the Court does not discuss amendments at all. Rather, *Ashbacker* simply requires that the Monroe/Wingate applicants be designated for comparative hearing before any of them is granted. That is happening by this *Order*.

22. Based on the foregoing, we find Wingate's petition for reconsideration to be meritless, and it will be denied below. The SCRF and WFSS applications will be processed in due course.[11]

OTHER MATTERS

23. Pursuant to the *First Report and Order* in MM Docket 88-375, 54 Fed. Reg. 16,363, applicants for or permittees of Class C2 frequencies must achieve at least minimum Class C2 facilities by June 1, 1991, or they will be reclassified to Class C3 facilities on that date. Neither CBCB nor Wingate currently specify minimum Class C2 facilities. Accordingly, an appropriate condition will be specified below.

24. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are acccepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
CBCB	January 13, 1989, May 13, 1989
IDC	October 22, 1986

25. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by IDC would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

26. *Share-time Arrangement.* The applicants have not indicated whether or not an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either

before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiation with a view toward establishing a share-time agreement between themselves.

27. *307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. § 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

28. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York Univerisity*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial FM signals within the respective service areas.

29. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and IDC have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by IDC would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

30. Except as indicated above, the applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

31. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the IDC would constitute a hazard to air navigation.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. § 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. § 307(b), the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

32. IT IS FURTHER ORDERED, That CBCB's Petition to Deny IS DENIED.

33. IT IS FURTHER ORDERED, That Wingate's December 19, 1988 Petition for Reconsideration IS DENIED and its resubmitted amendment IS RETURNED.

34. IT IS FURTHER ORDERED, That CBCB and Wingate must amend their proposals to specify minimum Class C2 facilities by June 1, 1991; alternatively, in the event of a grant of a construction permit to CBCB or Wingate prior to that date, the permit shall contain a condition requiring upgrade by that date or reclassification to Class C3 status will occur.

35. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: CBCB, IDC.

36. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

37. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of the adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau.

38. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing to present evidence on the issues specified in this Order.

39. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594(g) of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987).

[2] The date was established by *Report No. B-75*, released July 29, 1986.

[3] The deadline was established by Report No. A-101, released October 8, 1985.

[4] *See Kittyhawk Broadcasting Corporation*, 7 FCC 2d 153 (1967), *appeal dismissed sub nom. Cook, Inc. v. FCC*, 384 F.2d 84 (7th Cir. 1968).

[5] The petition is timely filed. Athough the letter returning the Wingate amendment and reinstating the SCRF application was dated October 14, Public Notice of the amendment's return was not released until November 17, 1989. Under the time computation rules contained in 47 C.F.R. § 1.4, the petition was filed within 30 days of the release of the Public Notice.

[6] Indeed, the SCRF application *was* returned on June 26, 1987 and was reinstated by the Commission's October 14 letter.

[7] Wingate cities *FCC v. Pottsville Broadcasting Co.*, 302 U.S. 134, 137-8 (1940); *FCC v. WJCR*, 337 U.S. 265, 281-83 (1949).

[8] The specific processing rule maintained in this section of Wingate's petition is "the time-honored 'first in time, first in right' axiom." Petition, at 13. This axiom, we take it, is derived from the protection afforded to NCE-FM applicants which have been cut-off.

[9] The notice and comment procedures of the APA do not, except when required by statute apply *inter alia*, "to interpretive rules, general statements of agency policy, or rules of agency organization, procedure, or practice." *Id.*

[10] On the other hand, returning the SCRF and WFSS applications clearly deprives Florence and Fayetteville residents of broadcast service.

[11] On December 19, 1988, Wingate filed informal objection to the SCRF and WFSS applications, based on the arguments presented in the petition for reconsideration. For the reasons stated above, those will be denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC. (hereafter "Central")	File No. BPH-880505MS
KING/HOLLY HILL, LTD. (hereafter "King")	File No. BPH-880505MW
INTERMART BROADCASTING, INC. (hereafter "Intermart")	File No. BPH-880505NI
HOLLY HILL RADIO PARTNERS (hereafter "HHRP")	File No. BPH-880505NQ
JOHN E. MORRIS and LAWRENCE R. BAKER, D/B/A MORBAK COMMUNICATIONS, A GENERAL PARTNERSHIP (hereafter "Morbak")	File No. BPH-880505NV
A. WAYNE ATCHLEY (hereafter "Atchley")	File No. BPH-880505OR
H.B. BROADCASTING, INC. (hereafter "HB")	File No. BPH-880505OU
WALO BROADCASTING LIMITED PARTNERSHIP (hereafter "Walo")	File No. BPH-880505OZ
SUN CITY RADIO GROUP, INC. (hereafter "Sun City")	File No. BPH-880505PC
SEABREEZE BROADCASTING GROUP, INC. (hereafter "Seabreeze")	File No. BPH-880505PE
JULIE E. LUBKE, D/B/A MODERN MEDIA (hereafter "Modern Media")	File No. BPH-880505PJ
MICHELLE N. TERZYNSKI (hereafter "Terzynski")	File No. BPH-880505PL
HOLLY HILL BROADCASTING CO. (hereafter "HHB")	File No. BPH-880505PG (Dismissed Herein)

For Construction Permit
for a New FM Station on
Channel 277A (103.3 MHz)
in Holly Hill, Florida.

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *HHB*. On August 15, 1988, HHB filed a petition for reconsideration of the July 25, 1988 action by the Chief, FM Branch returning its application as not sufficient for tender because FCC Form 301, Section V-B, Item 7 data conflicts with the antenna sketch data contained in Exhibit No. 1 of its application. In support of its petition, HHB argues that the Engineering Statement shows that the computed numbers on the antenna sketch are consistent and reliable; it is only the numbers in Section V-B, Item 7 which are not internally consistent. The radiation center above sea mean level (AMSL) of 103 meters, found in Section V-B, Item 7(b)(2), is identical to that shown on the antenna sketch. In addition, the values shown in Section V-B for the site elevation AMSL, the top of the supporting structure above ground level, and the top of the structure AMSL are all in agreement with their corresponding values depicted on the antenna sketch. It is only the height of the radiation center above ground as listed in Item 7(b) of the Form that is not correct. All of the numbers except the radiation center above ground are identical in both Item 7 and the antenna sketch and yield results that are arithmetically correct. The addition of 7(a)(1) to 7(b)(1) in Section V-B would produce 109 meters which is in excess of the total height of the tower (108 meters) as shown on the antenna sketch. Subtracting 7(a)(1) from 7(b)(2) would produce a radiation center AGL of 94 meters as shown on the antenna sketch. There-

fore, the only logical conclusion is that, Item 7(b)(1), being the one inconsistent number on the Form, must be erroneous.

3. We agree with this conclusion. By this method, the Commission's staff was able to resolve the discrepancy drawing on the application as a whole, and verify the correct height of the radiation center AGL as being 94 meters. Therefore, HHB's application will be reinstated for this purpose. However, pursuant to a *Public Notice* released on March 25, 1988, Mimeo No. W-37, the filing window for Holly Hill, Florida opened on March 25, 1988 and closed on May 5, 1988. As filed on May 5 1988, the original of HHB's application included only a facsimile copy of the applicant's signature. On May 6, 1988, the day after the window closed, HHB provided the original signature on the appropriate page for its application.[1] Section 73.3513(a)(3) of the Commission rules requires, when the applicant is a corporation, that the *original* application be signed by an officer and the requisite duplicates may be conformed. Such was not the case here. Furthermore, Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (1985), states that "because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender." *See also, Taber Broadcasting Company of New Mexico*, 4 FCC Rcd. 7892 (1989). Therefore, in view of the Commission's longstanding policy that the original application bear the original signature of the applicant, the application by HHB will be dismissed as not sufficient for tender.

4. *Sun City*. Information before the Commission indicates that Sun City was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Sun City's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against Sun City in this proceeding.

5. *Mobak*. On August 31, 1990, Morbak amended the instant application to report that in a *Memorandum Opinion and Order*, FCC 90M-2315, released July 31, 1990, the presiding Administrative Law Judge added the following issues to its application (BPH-880615MG), in the Ada, Ohio proceeding (Docket No. 90-142):

> To determine whether Morbak falsely certified to its financial qualifications in this proceeding; and if so, whether Morbak is basically qualified to be a Commission licensee;
>
> In light of its other financial obligations to other FM applications, whether Morbak is financially qualified to be a Commission licensee, and if not, whether its Ada application can be granted.

Morbak further states that it amended its application on August 16, 1990 requesting dismissal of its Ada application pursuant to a Joint Request for a Settlement Agreement. A review of the Commission's records reveals that Morbak's Ada application, pursuant to *Memorandum Opinion and Order*, FCC 90M-2617, released August 22, 1990, was ismissed with prejudice. Consequently, this dismissal left unresolved issues pending against the applicant. Therefore, such issues will be specified and tried against Morbak in this proceeding.

6. *Intermart*. On July 15, 1988, Intermart amended its application to add Patricia S. Fierro as Secretary/Treasurer and deleted David L. Cobb as one of its principals. On March 21, 1989 Intermart also amended its application to include Harley P. Park as Vice President, Chief Finance and Administrative Officer. The amendments are incomplete as they failed to contain pages 4 and 5 of Section II (Items 5-10) pertaining to Patricia S. Fierro's and Harley P. Park's legal qualifications. Accordingly, Intermart will be required to submit this information in an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *Walo, Sun City, Intermart*. Section II, Item 4 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the residence address of each of its principals. Walo has not completed Item 4 correctly. Walo gives a post office address for its Limited Partner, Jake Rasor, Jr. Sun City has also not completed Item 4 correctly. Sun City gives a post office address for its General Partner, Dan K. Richardson. Intermart amended its application on July 15, 1988 to include Patricia S. Fierro as its Secretary, Assistant Treasurer; on March 21, 1989, Intermart also included Harley P. Park as Vice President, Chief Financial and Administrative Officer of Intermart. However, Intermart failed to include the residence address for both parties in the instant application. Accordingly, Walo, Sun City and Intermart each will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Atchley*. Atchley has not submitted a description in narrative form of his proposed programming relating to the issues of public concern facing its service area, pursuant to Section IV of FCC Form 301.[2] Accordingly, Atchley will be required to file within 30 days of the

release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

9. In addition, on February 7, 1989, Atchley amended its application to specify a new transmitter site and on February 24, 1989, Atchley submitted a supplemental showing of good cause for the late-filed amendment. Atchley states that he changed his site after being informed by the Federal Aviation Administration (FAA) that his original site would not receive FAA clearance. The amendments were filed after the last date for filing minor amendments as of right. The requisite good cause showing under 47 C.F.R.§ 73.3522(a)(2) was subsequently filed; consequently, the amendments are accepted for filing. However, the applicant may not improve his comparative position after the last date for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

10. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Central	October 26, 1989
King	March 6, 1989; May 15, 1989; July 24, 1989
Intermart	September 26, 1988; November 17, 1988; February 1, 1989; March 21 1989; December 11, 1989; January 25, 1990; November 28, 1990
Morbak	September 15, 1988; February 21 1989; June 30, 1989; October 2, 1989; March 30, 1990; July 11, 1990; August 31, 1990
Walo	March 24, 1989

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Intermart and HB would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Sun City.

2. To determine whether Sun City's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Sun City possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether Morbak falsely certified to its financial qualifications in [the Ada, Ohio] proceeding; and if so, whether Morbak is basically qualified to be a Commission licensee.

5. In light of its other financial obligations to other FM applications, whether Morbak is financially qualified to be a Commission licensee, and if not, whether its Holly Hill application can be granted.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Intermart and HB would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for reconsideration filed by HHB IS GRANTED, and its application is DISMISSED for the reason set forth in paragraph 3 hereinabove.

16. IT IS FURTHER ORDERED, That the informal objection filed by HHRP, against the application of HHB, IS GRANTED for the reason set forth in paragraph 3 hereinabove.

17. IT IS FURTHER ORDERED, That Intermart shall submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by pages 4 and 5 of Section II of FCC Form 301.

18. IT IS FURTHER ORDERED, That Walo, Sun City and Intermart shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

19. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Atchley shall submit an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Central, King, Intermart, Morbak, Atchley and Walo ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

22. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

23. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

24. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On June 6, 1988 HHRP filed an informal objection to HHB's May 6, 1988 late-filed amendment. For the reasons set forth in paragraph 3 above, the informal objection will be granted to the extent indicated herein.

[2] Atchley indicates that its response to IV is contained in Exhibit 1 to FCC Form 301. However, it appears that Exhibit 1 was omitted from the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-640

In re Applications of

OUTREACH COMMUNICATIONS CORPORATION (hereafter "Outreach")
North Palm Beach, Florida
Reg: 88.3 MHz Channel 202A
1.0 kW (H&V) 45.5 meters HAAT
File No. BPED-860603MH

SOUTHWEST FLORIDA COMMUNITY RADIO, INC. (hereafter "Southwest")
West Palm Beach, Florida
Reg: 88.1 MHz Channel 201C2
50 kW (H&V) 127 meters HAAT
File No. BPED-891212MC

For Construction Permit
for a Noncommercial,
Educational FM Station

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, noncommercial, educational FM station.

2. *Preliminary Matter.* Outreach and Southwest are proposing to construct new noncommercial, educational FM stations on adjacent channels 202 and 201 to serve, respectively, North Palm Beach and West Palm Beach, Florida. Our study, made pursuant to 47 C.F.R. § 73.509, indicates that Outreach's predicted interfering (54 dBU) contour is completely within Southwest's protected (60 dBU) contour and that Southwest's interfering contour completely envelopes Outreach's protected contour. Since Southwest's application was filed prior to the December 14, 1989 cut-off date for applications mutually exclusive with Outreach's proposal, grant of one application would effectively preclude grant of the other. Accordingly, the applications are mutually exclusive and must be consolidated for hearing. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

3. *Southwest.* CBS, Inc., licensee of television Channel 6 station WCIX (Miami, Florida) petitioned, on September 13, 1990, to deny grant of Southwest's application. In its petition, CBS argued that Southwest should not use the 6 dBU adjustment for television directivity specified in 47 C.F.R. § 73.525(e)(1)(iii) because this method greatly underestimated the number of persons that would receive interference from Southwest's proposal to WCIX's signal. If this 6 dBU adjustment were used, CBS conceded, no person would receive TV Channel 6 interference pursuant to § 73.525. CBS estimates that, if the 6 dBU adjustment were not applied in this case, interference over northern Miami would be caused to 116,017 people.

4. The core of CBS's argument is that § 73.525(e)(1)(iii) is not accurate in this instance because it is premised on the assumption that most television viewers use outdoor TV antennas which, when compared to inside antennas (such as rabbit ears), are more sensitive and reject interfering signals better. CBS argues that most northern Miami viewers use indoor antennas since these sufficiently receive multiple television stations that do not operate on Channel 6. Southwest claims, and CBS concedes, that its proposal does not violate the requirements of § 73.525. Further, Southwest argues that CBS failed to provide any demonstrative proof of the number of persons using indoor antennas and that, since part of the interference area claimed by CBS is at a considerable distance (approximately 54 miles) from WCIX's transmitter site, reception utilizing an indoor antenna is not likely in any event.

5. The Commission staff has examined Southwest's proposal and has found it in compliance with the requirements of § 73.525. Specifically, using the 6 dBU adjustment permitted by § 73.525(e)(1)(iii), Southwest's proposal will not cause any TV Channel 6 interference. We are not persuaded by CBS's arguments that the 6 dBU adjustment is not applicable in this instance. While we recognize the possibility that there may be a predominance of indoor antennas in the area WCIX (TV) serves, this does not justify suspension of the rules. No special treatment for indoor antennas was adopted as a result of the Commission's inquiry in the noncommercial educational FM-Channel 6 interference proceeding. *See Memorandum Opinion and Order* in Docket 20735, 58 RR 2d 629 (1985). To require such treatment now would impose an arbitrary requirement without due consideration of the impact on noncommercial FM stations. Absent a Rule Making proceeding to modify the provisions of § 73.525, the current requirements are our only measure for considering the potential for Channel 6 interference. Consequently, the petition to deny filed by CBS will be denied.

6. *Other Matters.* Outreach and Southwest propose to locate their proposed transmitting antennas on existing towers: Outreach on the existing WNJY (FM) tower and Southwest on a tower it states is used by "multiple business radio systems." Both applicants list tower heights above ground (AGL) and above mean sea level (AMSL) that differ from those in our Antenna Survey Branch records. Outreach states that its tower is 165 meters AGL and 177 meters AMSL. Our records for this structure indicate these heights as 146.3 meters AGL/153.9 meters AMSL. Southwest lists its tower height as 146 meters AGL and 154 meters AMSL. Commission records state that the correct heights are 152.4 meters AGL/160.3 meters AMSL. Since both applicants indicated that they will operate from existing towers contained in the Commission's records, these discrepancies are neither a tenderability nor an acceptability defect and may be corrected by post-designation amendments to the presiding Administrative Law Judge. Until these discrepancies are resolved, an air hazard issue will be specified for both applicants.

7. Neither of the applicants has indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

9. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Outreach and Southwest would constitute a hazard to air navigation.

2. To determine: (a) the number of other reserved channel non-commercial educational FM services available in the proposed service area of which each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the petition to deny filed by CBS, Inc. against Southwest IS DENIED.

13. IT IS FURTHER ORDERED, That Outreach and Southwest must submit the amendment required by paragraph 6 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-637

In re Applications of

EARLIMART EDUCATION FOUNDATION, INC. (hereafter "Earlimart")	File No. BPED-890123MB
PEREZ-FM EDUCATIONAL FOUNDATION, INC. (hereafter "Perez")	File No. BPED-890123MD
MELINDA BOUCHER READ (hereafter "Boucher-Read")	File No. BPH-890123MM

For Construction Permit
for a New FM Station on Channel 245A
in Spokane, Washington

HEARING DESIGNATION ORDER

Adopted: December 18, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Earlimart	June 22, 1990
Boucher-Read	August 18, 1989

3. Earlimart filed amedments on June 25, 1990 and September 5, 1990, after the last date for filing amendments as of right. Under Section 73.3522(a)(6) of the Commission's Rules, amendments filed after that date will be considered only upon a showing of good cause for late filing or pursuant to Sections 1.65 or 73.3514 of the rules. Neither Earlimart's June 25 amendment nor its September 5 one met these requirements. Therefore, they will be returned below.

4. Section II, Item 4 of FCC Form 340 (May 1985) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Perez has not completed Item 4 correctly. Perez's application gives a post office box number as the residence address for Diane R. Perez. Accordingly, Perez must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Earlimart and Perez have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by Earlimart and Perez would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. The engineering data submitted by Boucher-Read shows that her proposal would not provide a 3.16 m/Vm signal to the entire proposed city of license, as required by section 73.315(a) of the Commission's rules. Boucher-Read has indicated that her proposal would reach 96% of the area and 99% of the population of Spokane. Accordingly, Boucher-Read has submitted facts and circumstances which persuade us that a waiver of section 73.315(a) is not required since there is substantial compliance with the rule. *Letter to Southwest Communications, Inc. (KLDN-FM)*, released July 16, 1986, citing *John R. Hughes, et. al.*, 50 Fed. Reg. 5679 (1985).

7. Boucher-Read proposes to sidemount her antenna on an existing tower currently utilized by several two-way communications facilities. Boucher-Read states that the elevation of her proposed supporting structure above mean sea level is 807 meters. However, Commission records indicate that the elevation of the top of that supporting structure above mean sea level is 804.7 meters. Because Boucher-Read proposed to locate on an existing tower contained in the Commission's records, the staff can, drawing on the application as a whole, verify its actual height by taking official notice of the tower height as found in Commission records. Accordingly, Boucher-Read must file an amendment to correct this discrepancy.

8. Earlimart's and Perez's applications, filed on FCC form 340, do not demonstrate that they are eligible to be noncommercial educational (NCE) applicants. These standards of eligibility were published in appendix A to the *Notice of Inquiry* in Docket #78-164, 43 FR 30842 (1978). Although they were meant for entities applying for reserved channels, they will be applied to Earlimart and Perez here, since they have chosen to present themselves as NCE applicants.

9. An entity seeking to become an NCE applicant must demonstrate that it is committed to a suitable educational program. Earlimart states that its purpose is:

> " . . . to build and operate a station that will be used to train and educate people interested in getting into the communications field who are unable to enter broadcasting elsewhere. The applicant will make such training and education available to females, minorities, and disadvantaged people who desire to get into the communications field but who do not have the opportunity to do so."

(Earlimart Application, Exhibit A). Perez states that its purpose is :

> " . . . to train female, minorities and handicapped persons in communications and in hopes of entering broadcasting for employment."

(Perez Application, Exhibit A).[1] The fact that Earlimart and Perez propose to use their facilities for vocational broadcast training is not relevant to determining their eligibility to become NCE licensees. *See Way of the Cross of Utah, Inc.*, 58 RR 2d 455, 460 (1985). Therefore, these "educational programs" clearly do not meet the eligibility requirements. Earlimart and Perez have the burden of establishing their eligibility as NCE applicants. Both Earlimart and Perez have failed to provide the necessary information called for by our rules and procedures, making their applications defective. If Earlimart and Perez were proposing to operate on a reserved channel, their applications could be dismissed for this deficiency without hearing. *Bible Moravian Church*, 28 FCC 2d 1, (1971); *see also Way of the Cross, supra*. However, because Earlimart and Perez are proposing to operate on a commercial channel, we will merely specify educational qualifications issues against them.

10. Earlimart, in addition to the subject application, filed for a new station in Spokane, Washington on Channel 284A (File No. BPED-890123MA). The Commission's multiple ownership rules, 47 C.F.R. § 73.3555, prohibit, *inter alia*, grant of an application if so doing would create an overlap of the 3.16 mV/m contour with that of another station owned, operated or controlled by the same applicant. This prohibition however, does not apply to NCE applicants. *See* 47 CFR 73.3555(f). If Earlimart is found unqualified to be an NCE applicant, then the subject application, being the one reached for processing latest, will be dismissed. *See* 47 C.F.R. § 73.3518; and *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987).

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Earlimart and Perez would constitute a hazard to air navigation.
>
> 2. To determine, with respect to Earlimart and Perez, whether the applicants are qualified to be noncommercial educational FM licensees.
>
> 3. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Earlimart and Boucher-Read ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 3, *supra*, the amendments filed by Earlimart on June 25, 1990 and September 5, 1990, ARE HEREBY RETURNED.

15. IT IS FURTHER ORDERED, That Perez shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Boucher-Read shall submit an amendment with the presiding Administrative Law Judge correcting the discrepancy between its application and the Commission's records regarding the elevation of the top of the supporting structure above mean sea level.

17. IT IS FURTHER ORDERED, That Earlimart shall file an amendment listing completely its other media interests with the presiding Administrative Law Judge within 30 days of the release of this Order.

18. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 10 above, if it Earlimart is found to be unqualified to be an NCE-FM applicant, its application will be DISMISSED.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issues only.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Perez also proposed to establish a local news bureau and contact local and regional community leaders. However, neither of these demonstrates either a valid educational purpose or a programming proposal to further that purpose.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-443

In the Matter of

Amendment of Section 73.202(b), RM-7239
Table of Allotments,
FM Broadcast Stations.
(Sikeston, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5940 (1990), issued in response to a petition filed by Delta Radio Corporation ("petitioner") proposing the substitution of FM Channel 250C3 for Channel 249A at Sikeston, Missouri. Petitioner also requested modification of its license for Station KSTG(FM), Channel 249A, to specify operation on Channel 250C3. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 250C3 for Channel 249A at Sikeston, Missouri, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1] In addition, we will modify the license for Station KSTG(FM), Sikeston, to specify operation on Channel 250C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Sikeston, Missouri	250C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station KSTG(FM), Sikeston, Missouri, IS MODIFIED to specify operation on Channel 250C3, in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 250C3 are 36-57-30 and 89-32-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-438

In the Matter of

Amendment of Section 73.202(b), RM-7441
Table of Allotments,
FM Broadcast Stations.
(Dock Junction, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5841 (1990), issued in response to a petition for rule making filed by Lorraine M. Wiggins ("Wiggins"), permittee of Station WXMK(FM), Channel 290A, Dock Junction, Georgia, proposing the substitution of Channel 290C3 for Channel 290A at Dock Junction and modification of her construction permit for Station WXMK(FM) to specify the higher class channel. Southland Radio, Inc. ("Southland"), successor-in-interest to Wiggins, filed comments stating its intention to apply for Channel 290C3, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 290C3 for Channel 290A at Dock Junction since it could provide a wide coverage area FM service to the community. Channel 290C3 can be allotted to Dock Junction in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.5 kilometers (1.6 miles) east of the community,[1] in order to avoid a short-spacing to a proposal to substitute Channel 290C3 for Channel 290A at Lakeland, Georgia. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will modify the construction permit of Station WXMK(FM) to specify operation on Channel 290C3 at Dock Junction.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

Community	Channel No.
Dock Junction, Georgia	290C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WXMK(FM), Dock Junction, Georgia, IS MODIFIED to specify operation on Channel 290C3 in lieu of Channel 290A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 290C3 at Dock Junction are North Latitude 31-11-30 and West Longitude 81-28-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-596

In the Matter of

Amendment of Section 73.202(b), RM-7144
Table of Allotments,
FM Broadcast Stations.
(Canton, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Dallas M. Tarkenton ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8793 (1989), proposing the substitution of Channel 274A for Channel 273A at Canton, South Dakota, and the modification of petitioner's construction permit for Station KIXS to specify the alternate Class A channel. Petitioner filed comments reiterating his intention to apply for Channel 274A, if allotted. No other comments were received.[1]

2. We believe the public interest would be served by substituting Channel 274A for Channel 273A at Canton, South Dakota, since it could enable Station KIXS to specify 6 kW operation. Channel 274A can be allotted to Canton in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KIXS' outstanding construction permit.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Canton, South Dakota	274A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Dallas M. Tarkenton, for Station KIXS, Canton, South Dakota, IS MODIFIED to specify operation on Channel 274A, in lieu of Channel 273A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On December 13, 1990, petitioner filed a petition for rule making requesting the substitution of Channel 274C2 for the Class A channel at Canton and the modification of Station KIXS accordingly (RM-7598). That petition will be the subject of a separate *Notice of Proposed Rule Making*.

[2] The coordinates for Channel 274A at Canton are North Latitude 43-17-05 and West Longitude 96-32-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-455

In the Matter of

Amendment of Section 73.202(b), RM-7356
Table of Allotments,
FM Broadcast Stations.
(Bloomer, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 30, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6194 (1990), issued in response to a petition filed by Starcom, Inc. ("petitioner"), proposing the substitution of FM Channel 236C3 for Channel 236A at Bloomer, Wisconsin. Petitioner also requested modification of its construction permit (BPH-880421MI) for Station WPHQ(FM) to specify operation on Channel 236C3 in lieu of Channel 236A. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 236C3 for Channel 236A at Bloomer, Wisconsin, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1] In addition, we will modify the construction permit for Station WPHQ(FM), Bloomer, to specify operation on Channel 236C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bloomer, Wisconsin	236C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the construction permit for Station WPHQ(FM), Bloomer, Wisconsin, IS MODIFIED to specify operation on Channel 236C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 236C3 are 45-00-30 and 91-19-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-145

In the Matter of

Amendment of Section 73.202(b),	RM-6201
Table of Allotments,	RM-6408
FM Broadcast Stations.	RM-6409
(Summerville, Summerton and	
Bowman, South Carolina)	

ERRATUM

Released: January 30, 1991

By the Assistant Chief, Policy and Rules Division:

1. By *Report and Order*, released December 13, 1990, the Commission *inter alia*, substituted Channel 227C2 for Channel 228A at Summerville, South Carolina, and modified the license of Millennium Communications of Charleston, Inc., for Station WWWZ-FM to specify operation on the higher powered channel. The staff inadvertently stated, in footnote 6, that an application for Channel 227C2 at Summerville would not be accepted until action is taken by the Court of Appeals in *Chester County Broadcasting Co. v. FCC*, Nos. 90-1496 *et al.* (D.C. Cir. Oct. 19, 1990). By this *Erratum*, the last sentence of footnote 6 is amended to read as follows:

> Therefore, we will delay the opening of the application filing window for Channel 238A at Summerton until action is taken by the Court of Appeals.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-652

In re Applications of

BRIARWOOD PRESBYTERIAN CHURCH (hereafter "Briarwood")	File No. BPED-870812MC
THE UNIVERSITY OF ALABAMA (hereafter "UNIV")	File No. BPED-880603MA

For Construction Permit for a New Noncommercial FM Station on Channel 203 in Birmingham, Alabama

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. While UNIV indicated in a letter dated March 10, 1989, that the applicants were "communicating" *vis-a-visa* share-time agreement, no such agreement has been filed to date. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency, and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49,560, published October 24, 1978. In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from continuing negotiations with a view toward establishing a share-time arrangement.

3. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
UNIV	December 14, 1990

4. Briarwood failed to submit information regarding the areas and populations which would receive service from its proposal. Accordingly, Briarwood must supply this information in the form of an amendment to its application submitted to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. *Petitions to deny*. Great American Television and Radio Company, Inc. (Great American) filed petitions to deny against Birmingham and UNIV on June 2, 1988 and March 6, 1989 respectively. The petitions allege that each applicant failed to comply with Commission Rule 73.525 (47 CFR §73.525) and should therefore be amended or dismissed. Rule 73.525 governs TV channel 6 protection from interference.

6. Great American alleges that when measuring its proposal's interference with Channel 6 reception, Briarwood incorrectly extrapolated Channel 6 field strength above 90 dBu. On July 5, 1988, Briarwood filed an Opposition to Petition to Deny stating that it was in full compliance with Commission Rule 73.525[1]. It also stated that any claim of interference should be tempered by the affected station's (WBRC-TV) alleged refusal to consider the co-location of Briarwood's antenna on the Channel 6 tower.

7. Briarwood is proposing to locate 8.7 kilometers from Channel 6 TV Station WBRC-TV, Birmingham. 47 CFR § 73.525(c) states that for new NCE-FM stations proposing to operate on Channels 201-220, a showing must be submitted indicating that the predicted interference area resulting from the proposed facility will contain no more than 3,000 persons. This interference area is to be calculated pursuant to 47 CFR § 73.525(e) which incorporates the graphs contained in Section 73.599. Pursuant to paragraphs 29 and 30 of the *Second Further Notice of Proposed Rule Making*, Docket 20735, FCC 82-225, released May 26, 1982, the field strength of 90 dBu is to be used for those locations where the predicted TV field strength exceeds 90 dBu. However, an engineering review of Briarwood's proposal indicates that it used the actual Channel 6 TV field strength value for Channel 6 TV field strengths greater than 90 dBu. Since Birmingham's interference showing is based on Channel 6 TV field strengths in excess of 90 dBu, the showing does not comply with Commission rules.

8. Further, WBRC-TV is under no obligation to provide space on its tower in order to allow Briarwood to co-locate with it. The Commission encourages, but does not require, co-location of NCE-FM stations and Channel 6 TV stations. Briarwood's inability to co-locate with WBRC-TV, for whatever reason, does not excuse it from complying with Commission rules.

9. Regarding UNIV,[2] Great American states that UNIV's proposed operation would be within 400 meters of a Channel 6 tower and it is therefore subject to the requirements of Section 73.525(d)(2) of the Commission's Rules. Great American alleges that UNIV is not in compliance with these requirements.

10. UNIV is proposing to locate 0.1 kilometer away from Channel 6 TV Station WBRC-TV Birmingham. 47 CFR § 73.525(d)(2) states, in part, that an application for an NCE-FM station operation on Channels 201-220 and located at 0.4 kilometers or less from a TV Channel 6 station are collocated and will be accepted if the NCE-FM application includes a certification that the applicant has coordinated its antenna with the affected TV station by either employing the same number of antenna bays with radiation centers separated by no more than 30 meters

vertically (approximately 100 feet) or the FM vertical pattern not exceeding the TV vertical pattern by more than 2 dB. UNIV states that "[t]he proposed ERP in conjunction with the vertical radiation pattern of the 4 bay FM antenna is sufficient to avoid causing any interference despite the fact that the radiation center of the proposed FM is not within 100 feet of the existing TV Channel 6 operation." An engineering study of UNIV's proposal indicates that the proposed vertical pattern would exceed WBRC-TV's vertical pattern by more than 2 dB.

11. In light of the above discussion, UNIV and Briarwood must verify that their showings are in compliance with the Commission's rules regarding protection of TV Channel 6 stations, or resolve the noted discrepancies by submitting appropriate amendments to the presiding Administrative Law Judge within 30 days of this Order, or an appropriate issue will be specified by the judge.

12. UNIV is the defendant in numerous "discrimination" complaints, which are catalogued in Exhibit II, Sections D-E of its application. [3] Accordingly, while UNIV will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded to it as a result of this proceeding shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of these pending actions.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; (b) the extent to which the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcasting service.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That the petition for leave to amend filed by UNIV IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Briarwood shall submit an amendment to the presiding Administrative Law Judge containing information regarding the areas and populations that will receive service from its proposal.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Briarwood and UNIV shall submit amendments demonstrating compliance with Commission rule 73.525, pursuant to the discussion in paragraphs 5 through 11, *supra*, and that the petition to deny filed by Great American IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, That, in the event a construction permit is granted to UNIV, it shall be without prejudice to whatever action, if any, the Commission deems appropriate in light of the pending complaints listed in Exhibit 2, Sections C-E of its application.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] On July 20, 1988, Great American filed a Reply to Briarwood's Opposition.

[2] UNIV, to date, has not filed an Opposition to the Petition to Deny.

[3] These include four pending court cases, twenty pending EEOC complaints, and two other administrative matters involving charges of sex and race discrimination. For the sake of brevity, these will not be enumerated in this document.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-654

In re Applications of

THE CEDARVILLE COLLEGE (hereafter "College") File No. BPED-881214MN

Ohio University (hereafter "University") File No. BPED-890922MA

For Construction Permit
for a New FM Station on Channel 220A
in Chillicothe, Ohio

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new, non-commercial, educational FM station.

2. *College*. Section II, Item 8 of FCC Form 340 (May 1989) requires that an applicant specify the home address of each of its principals. College has not completed Item 8 correctly. College's application does not list the residence address for any of its board members. Accordingly, College must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

3. The USA-Canada Broadcast Agreement requires formal coordination between the countries for any broadcast station proposal for which an allocation has not previously been established. Since educational stations do not have predesignated allotments, this proposal has been reviewed under the provisions of the agreement. As College's proposal does not violate any provisions of the treaty, formal coordination with the Canadian government has been initiated, but that government's concurrence has not yet been received. Consequently, should College be awarded a construction permit as a result of this proceeding, the grant shall be made contingent upon receipt of concurrence from Canada regarding College's application.

4. *Other Matters*. Section 73.1125 of the Commission's Rules requires that the main studio of an FM station be located within the station's 3.16 mV/m (70 dBu) contour, but on a showing of good cause may be located outside that contour. Neither College nor University propose to operate with a main studio within the predicted 70 dBu contour. College proposes to duplicate the programming of its Cedarville, Ohio station, WCDR-FM and University proposes to duplicate the programming of its Athens, Ohio facility, WOUB-FM.

5. In support of waiver requests of Section 73.1125 of the rules, both applicants indicate that they will ensure that local issues in Chillicothe will be met. College represents that it will (1) maintain a toll-free telephone line to the studios and offices; (2) use individuals in Chillicothe to serve as news and public affairs reporters and (3) review annually the need and feasibility for a local studio, staffed by station personnel, for the purpose of improving the coverage of local events. Similarly, University represents that it will ascertain any and all reasonable means including (1) reading local papers, (2) periodic interviews with local business, charity and labor leaders and (3) conversations with local activists in a variety of areas.

6. The Commission has traditionally allowed noncommercial educational licensees to operate in this matter. *See Nebraska Educational Television Commission*, 4 RR 2d 771 (1965). In so doing, the Commission recognizes the realities of public broadcasting funding and the ongoing problems of educational licensees in raising the necessary funds to expand and provide noncommercial educational programming to as many viewers as possible. College and University proposals are consistent with this concept. The savings realized from not having to construct a main studio can be utilized to assist both applicants in expanding quality programming to a greater number of listeners. We conclude, therefore, that good cause exists for not locating a main studio in Chillicothe and, in light of the above, College and University's request for waiver of 47 C.F.R. § 73.1125(a) is granted.

7. *Share-time Arrangement*. An issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfallon Denver Educational Broadcasting, Inc.*, 43 Fed. reg. 49560 (October 24, 1978). It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

8. Inasmuch as it appears that there would be a significant difference in the size of the populations which would receive service from the proposals, and since this proceeding involves competing applicants for noncommercial educational facilities, the standard population issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; (b) the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That College shall submit an amendment which contains the information required by Section II, Item 8 of FCC Form 340, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHERED ORDERED, That if College is awarded a construction permit as a result of this proceeding, it shall be contingent upon receipt of concurrence from Canada.

13. IT IS FURTHERED ORDERED, That the waiver requests of Section 73.1125 of the Commission's Rules, filed by College and University, ARE GRANTED.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-653

In re Applications of

GRANITE STATE EDUCATIONAL FELLOWSHIP, INC. (hereafter "GSEF") — File No. BPED-890321MR

For Construction Permit for a New Noncommercial FM Station on Channel 219 in Walpole, New Hampshire

KEENE STATE COLLEGE (hereafter "Keene State") — File No. BPED-880426MP

For Modification of the Facilities of Station WKNH(FM), Keene, New Hampshire

HEARING DESIGNATION ORDER

Adopted: December 31, 1990; Released: January 30, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive application for a new noncommercial FM station in Walpole, New Hampshire, and the mutually exclusive application to modify the facilities of Station WKNH(FM), Keene, New Hampshire.[1]

2. *Section 307 (b).* The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining pursuant to 47 U.S.C. Section 307(b) which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will be specified.

3. *Areas and Populations.* Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since this proceeding involves competing applications for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available noncommercial educational FM signals within the respective areas.

4. On behalf of Keene State, New Hampshire Public Radio wrote to GSEF on November 2, 1990, proposing a possible solution to the mutually exclusive applications. New Hampshire Public Radio proposed that GSEF withdraw its application for Channel 219 and file an application for a new frequency on Channel 201. GSEF did not respond to this correspondence.

5. *Sharetime Agreement.* It does not appear that the applicants have discussed negotiations of a possible share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing, or at anytime during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement between themselves.

6. *Eligibility of GSEF.* GSEF filed on FCC Form 340, and did not demonstrate that it is eligible to be a noncommercial educational (NCE) applicant. It failed to include a program narrative or provide any examples demonstrating that its proposed programming will carry forward an acceptable educational format in compliance with 47 C.F.R. Section 73.503. These standards of eligibility were published in Appendix A to the *Notice of Inquiry* in Docket No. 78-164, 43 Fed. Reg. 30842 (1978). As a result, an appropriate issue will be specified.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest, and, if so, the terms and conditions thereof; and (c) in light of 47 U.S.C. Section 307(b), which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

2. To determine whether GSEF is qualified to be a noncommercial educational FM licensee.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to 47 U.S.C. Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational operation and objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On June 28, 1989, the Commission returned Granite State Educational Fellowship, Inc.'s (GSEF) application for a new facility. This application was mutually exclusive with Keene State College's application to change frequencies to Channel 219. The Commission then, having found Keene State's application grantable, granted the modification on October 12, 1989. However, the Commission inadvertently failed to take into account the Petition for Reconsideration filed July 28, 1989 by GSEF, which was ultimately granted, and the application, as amended, was accepted *nunc pro tunc*. Accordingly, the Commission rescinded Keene State's October 12, 1989 construction permit BPH-880426MP and restored the mutual exlusivity of both applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-45

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Expand
Eligibility and Shared Use Criteria
For Private Land Mobile Frequencies

REPORT AND ORDER

Adopted: January 17, 1991; Released: January 30, 1991

By the Commission:

I. BACKGROUND

1. We initiated this proceeding in March 1989 with the goal of introducing greater flexibility into the shared use of licensed private land mobile facilities.[1] We proposed to accomplish this goal by making three specific changes to the Part 90 eligibility criteria. First, we proposed to permit non-eligible entrepreneurs (private carriers) to be licensed directly in most Part 90 radio services below 800 MHz. Private carriers would be able to serve only those end users eligible within a particular service. Second, we proposed to allow private carriers operating in the Business Radio Service to serve all Part 90 eligibles, rather than only Business Radio Service eligibles. Finally, we proposed to permit private carrier paging providers licensed on paging-only channels in the Business Radio Service below 800 MHz and on the Private Carrier Paging channels at 900 MHz (who currently may offer service only to Part 90 eligibles) to serve individuals and the Federal Government as well. We believed that these rule changes would enhance the public interest by creating additional communication service options, promoting more efficient use of the spectrum, and encouraging use of new technologies. In addition, we expected that the rule changes would make private land mobile service more affordable and extend its availability to a broader range of eligible end users.

2. We received over 500 comments and reply comments in response to the *Notice*. Most of the comments come from members of the public safety community who discuss only the first of the three proposals. Their primary concern is that the private carrier systems described in the *Notice* would permit an outside entrepreneur to have ultimate control of systems operating on public safety frequencies,[2] depriving public safety agencies of the control over their communications systems. They believe that this control is essential to ensure the reliability, coverage, and technical features necessary for prompt response to emergencies.[3]

3. In addition, various trade associations submitted comments in response to the aspect of our first proposal concerning the licensing of private carriers on the Industrial and Land Transportation channels. In support of this aspect of the proposal, The American SMR Network Association, Inc., (ASNA) states that private carriers are able to promote efficient use of the private radio spectrum. ASNA also notes that, in essence, private carriers already exist in each of the Part 90 services; current rules, however, require the licensee itself to be eligible or, if an entrepreneur wishes to provide service, that the entrepreneur convince an eligible end user to be the licensee. Finally, ASNA notes that under the proposal, private carrier service would merely be an option, and no end user would be required to use the services of a private carrier.[4] Generally, parties opposing this aspect of the proposal argue that direct licensing of private carriers may cause interference and increase congestion.[5] Commenters also express concern that private carriers will not satisfy the unique communications requirements of Industrial and Land Transportation entities.[6]

4. Commenters supporting the second proposal in the *Notice*, which would permit private carriers in the Business Radio Service to serve all Part 90 eligibles, generally view it as an opportunity to relieve crowding on public safety channels by transferring non-critical communications to other frequencies.[7] In addition, these commenters express their belief that the proposal would assist small underfinanced agencies, particularly those in rural areas.[8] These commenters also view the proposal as an opportunity to provide public safety agencies increased options, greater flexibility and improved service.[9] In general, however, commenters opposed this proposal and raised the concern that it would have a negative impact upon spectrum efficiency and communications quality. In the opinion of the opposing commenters, the proposal would lead to underutilization of public safety spectrum coupled with increased traffic on already congested business frequencies.[10]

5. Finally, private carrier paging companies generally support our third proposal, which would permit private carrier paging systems operating on paging-only channels to offer service to individuals and the Federal Government. According to these parties, private paging is a cost effective and spectrum efficient communications option that should be made available to additional end users.[11] In opposition to the proposal, public safety end users, common carriers, and others raise the concern that private spectrum is overcrowded and that individuals and the Federal Government have sufficient existing options on common carrier paging systems and Federal Government spectrum.[12] They also argue that allowing these additional users onto private systems would blur the distinction between private carriage and common carriage.

II. DISCUSSION

6. After reviewing the record and considering the concerns raised in the comments, we have decided to adopt certain aspects of our proposal that can be accomplished on one-way paging-only channels. We conclude, however, that it is not prudent at the present time to proceed with the aspects of our proposal affecting two-way operations.

Two-Way Operations

7. When we proposed to expand private carrier operations on two-way channels below 800 MHz, we considered it a logical extension of our prior success in licensing Specialized Mobile Radio (SMR) systems.[13] However, problems exist on shared frequencies that do not exist for SMR systems, which have exclusive use of channels in a given area. These problems include congestion and less sophisticated technologies. As the result of comments addressing these issues, we have reevaluated the role of private carriers in shared spectrum. We conclude that the current operating environments, *i.e.*, the lack of channel exclusivity, would limit the ability of private carriers on shared frequencies to offer end users benefits comparable to those attainable on SMR channels.

8. To address the problems that exist on shared channels, we may need to implement improvements more significant than those that private carriers can offer. Private carriers may be able to reduce congestion slightly in the short run but also may encourage new and existing end users to remain on these congested frequencies. This may impede long term spectrum management efforts of a greater magnitude.[14] Due to this overriding spectrum management issue, we will not adopt our proposal to license non-eligible private carriers in these private land mobile radio services. Nor will we permit licensees operating on two-way channels in the Business Radio Service to share these channels with entities not currently eligible in the Business Radio Service. Rather than offering additional service options in this crowded spectrum, we are encouraging end users to seek other available options that employ less crowded frequencies, including using SMR services. Although we take no action at this time to implement a private carrier option on two-way channels, we note that such private carriers might, at some future date, provide a useful means for implementation of new technologies. Therefore, we terminate this aspect of this proceeding without prejudice to considering this option further at a later time.

One-Way Paging-Only Channels

9. Most private land mobile channels can be used for two-way operations. There are, however, a limited number of frequencies reserved for one-way paging-only purposes. These frequencies are part of the Special Emergency Radio Service, the Business Radio Service, and the 929-930 MHz band.

10. Paging-only channels generally have a greater capability to accommodate additional users. Paging occurs in short bursts and, thus, additional communications do not use significant air time. *See* Comments of NABER at 6-7; Comments of Message Center Beepers at 3-4. Furthermore, one-way channels can utilize more spectrum efficient technologies, such as batch processing digital paging, which are not available on two-way channels. *See* Comments of Celpage at 5-6. Thus, a single paging channel can accommodate over 10,000 subscribers. *See* Reply Comments of Celpage at 4-5. Similar technical factors recently led to our determination that paging-only channels in the Special Emergency Radio Service (SERS) could easily accommodate additional traffic. *See Memorandum Opinion and Order*, PR Docket No. 87-312, 5 FCC Rcd 3471 (1990). We reach the same conclusion with respect to paging-only channels in the Business Radio Service and Private Carrier Paging (PCP) channels in the 929-930 MHz band.

11. Under current rules, licensees on paging-only channels in the Business Radio Service may share their systems only with other Business eligibles, which generally excludes entities eligible in the Police, Fire, Local Government and other public safety radio services. The record of this proceeding includes comments from local agencies and their representatives who think that access to private systems could provide additional flexibility. *See* Comments of Bergen County Department of Public Safety at 2; Comments of Public Safety Communications Council at 2; Comments of AASHTO at 3. They say, for example, that this option is particularly useful for small agencies without adequate funding to build their own systems, especially in rural areas where there may be an existing Business Radio Service private carrier but not another local government agency with a system to share. *See* Comments of Los Angeles County at 3; Comments of ASNA at 7. Based on our consideration of these comments, we conclude that it would be in the public interest for public safety entities to be eligible as end-users of paging-only systems in the Business Radio Service and shall amend our Rules accordingly.

12. Next, we consider whether the Federal Government should be eligible to use private carrier paging services. Under current rules, the Federal Government cannot use private carrier systems either in the Business Radio Service or on the PCP channels in the 929-930 MHz band because the Federal Government is not eligible in the Business Radio Service or in any other service in Part 90. We have been approached a number of times to satisfy Federal Government requirements using private systems and, on occasion, have waived this eligibility requirement to allow private paging systems to serve the Federal Government. *See Request for Waiver of Pass Word, Inc.*, 5 FCC Rcd 1180 (Private Radio Bureau 1990). In one case, for example, we found that frequencies reserved for Federal Government systems are not suitable for certain law enforcement needs of the Drug Enforcement Administration. *Id.*

13. Moreover, established National Telecommunications and Information Administration (NTIA) policies provide that the Federal Government typically should not use Federal Government frequencies to provide telecommunications service to government agencies unless commercial services are either unavailable, are not suitable, or are significantly more expensive.[15] As a result, the Federal Government relies very heavily on the private sector for its telecommunications service.[16] In general, a Federal Government radio system would be acceptable only if it would be at least ten percent less expensive than a commercial alternative that provided essentially equivalent service.[17]

14. These long-standing policies were originally focused on the use of communications common carriers because communications private carriers did not exist at the time. As the private carrier industry developed starting in the late 1970's, use of these private systems typically was limited to what were the traditional private land mobile radio users at that time, which excluded Federal Government entities. As previously observed, however, in recent years we have have received a number of requests to waive our eligibility requirements to permit Federal Government users to avail themselves of mobile communication service from private carriers. In this regard, it is not always economical for governmental entities to operate their own paging systems. In rural areas and small cities,

for example, government offices may not be large enough to warrant the expense to taxpayers of constructing paging systems. These entities, moreover, may have specialized communications needs that the private radio services are uniquely able to provide. Licensees on paging-only channels in the Business Radio Service and on PCP channels in the 929-930 MHz band[18] are well situated to provide Federal Government users these communications alternatives.[19] We will, therefore, adopt our proposals to allow these licensees to serve the Federal Government.[20] This is consistent with NTIA policy and is a natural extension of the rapid growth and development of the private carrier industry and its ability to provide a wide array of mobile communication services at competitive prices.

15. We will not, however, adopt our proposal to expand private carrier paging service to individuals. Unlike the Federal Government, individuals do not generally have communications needs that cannot be satisfied within existing options. Although several private carrier paging companies filed comments supporting our proposal, they focus primarily on their desire and ability to serve additional customers rather than on the need among individuals for private carrier service.[21] Therefore, we find these comments to be an insufficient basis for adopting the proposal. Additionally, in the case of individuals, there is no history of waiver grants to form an independent basis for adopting the proposal. Accordingly, we determine that, at this time, individuals shall remain ineligible to use private carrier paging service.[22]

III. CONCLUSION

16. In summary, this proceeding amends our Rules as follows: (1) to permit private carrier paging licensees operating on paging-only channels in the Business Radio Services to provide radio communications service to all Part 90 eligibles and to the Federal Government; and (2) to allow Private Carrier Paging licensees operating in the 929-930 MHz band to serve the Federal Government. These amendments will extend the benefits of private radio communications service to a greater number of users by providing additional service options for eligibles in a manner responsive to present day demands and capabilities.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

17. We are expanding end user eligibility on private carrier paging systems to respond to the needs of governmental entities requiring additional communications options. Our decision is based on the ability of paging-only frequencies to handle additional traffic. We decline to introduce new private carrier options on two-way frequencies in recognition of current congestion on those frequencies and the need for long term spectrum management efforts.

Effect on Small Entities

18. This action will provide small governmental agencies an additional service option and will give small paging companies the opportunity to serve additional customers. Due to the short-burst nature of paging operations, providing these additional options on one-way paging channels will have no effect on small entities already using the channels. One commenter, NABER, specifically addressed our Initial Regulatory Flexibility Analysis, saying that extending eligibility on congested two-way channels could adversely affect small businesses. *See* Comments of NABER at 5. This concern is moot in view of our decision to amend only those rules pertaining to one-way channels. NABER agrees that one-way channels can accommodate additional traffic. *Id.* at 6.

Alternatives Considered

19. Aside from maintaining the status quo, there are no significant alternatives besides those considered in this *Report and Order*.

V. PAPERWORK REDUCTION ACT STATEMENT

20. The action taken herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(g), 303(r) and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r) and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in Appendix A below, effective 30 days after Federal Register publication.

22. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 STAT., as amended, 1066, 1082, 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.75 is amended by revising paragraph (c)(10) to read as follows:

§ 90.75 Business Radio Service

* * * * *

(c) * * *

(10) This frequency is assigned only for one-way paging communications to mobile receivers. Only A1D, A2D, A3E, F1D, F2D, F3E or G3E emissions may be authorized. Licensees may provide one-way paging commu-

nications on this frequency to persons eligible for licensing under Subparts B, C, D or E of this part and to representatives of Federal Government agencies.

* * * * *

3. 47 C.F.R. § 90.494 is amended by revising footnote 1 in the table in paragraph (a) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz Band

(a) * * *

FOOTNOTE TO APPENDIX

[1] Above Line A this frequency is available only to eligibles in Pool 1. Frequencies listed in Pool 1 are available for shared use by all eligible Part 90 users except those eligible as private carrier paging (PCP) licensees. Frequencies listed in Pool 2 are available only for shared use by private carrier paging (PCP) licensees in providing one-way paging service to representatives of Federal Government agencies and to persons eligible for licensing under Subparts B, C, D or E of this part. Frequencies 929.7625 and 929.9875 are available for shared use in multi-area paging systems by private carrier paging (PCP) licensees. Frequencies 929.2625 and 929.4875 are available only for shared use in multi-area paging systems for all Part 90 users except private carrier paging (PCP) licensees.

* * * * *

FOOTNOTES

[1] Notice of Proposed Rule Making, PR Docket No. 89-45, 4 FCC Rcd 2589 (1989) (*Notice*).

[2] In the *Notice*, we proposed to extend the private carrier concept to only two of the five radio services that comprise the public safety category, these being the Highway Maintenance and Forestry-Conservation Radio Services. We tentatively proposed to continue our existing prohibition on licensing entrepreneurs in the Local Government, Police and Fire Radio Services, the remaining public safety services.

[3] *See, e.g.*, Comments of Associated Public-Safety Communications Officers (APCO) at 9-11; Comments of Montgomery County Telecommunications Section at 3-4; Comments of California Department of General Services at 5-6; Comments of Connecticut State Police at 3.

[4] *See* Comments of ASNA at 4-7.

[5] *See, e.g.*, Comments of Special Industrial Radio Service Association (SIRSA) at 11; Comments of Manufacturers Radio Frequency Advisory Committee (MRFAC) at 2; Comments of Association of American Railroads (AAR) at 3-9; Comments of Forest Industries Telecommunications (FIT) at 3,7.

[6] *See, e.g.*, Comments of SIRSA at 10; Comments of Telecom Plus Transmission Services (Telecom) at 3-4; Comments of American Petroleum Institute (API) at 5-6; Comments of Utilities Telecommunications Council (UTC) at 3-6; Comments of AAR at 2-3.

[7] *See, e.g.*, Comments of APCO at 21; Comments of Public Safety Communications Council at 2.

[8] *See, e.g.*, Comments of ASNA at 7; Comments of California Department of General Services at 1.

[9] *See, e.g.*, Comments of ASNA at 8; Comments of North Dakota Radio Communications Department at 1.

[10] *See, e.g.*, Reply Comments of SIRSA; Comments of FIT at 5; Comments of UTC at 8; Comments of National Association of Business and Educational Radio at 4-5.

[11] *See, e.g.*, Reply Comments of Celpage, Inc. at 4-5; Reply Comments of Metagram America, Inc., at 6; Comments of ASNA at 9.

[12] *See, e.g.*, Comments of City of Mesa, Arizona at 3-4; Comments of Minnesota Department of Transportation at 4; Comments of Telocator at 13-14; Comments of API at 17-18.

[13] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974), *recon.*, Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd sub nom.* NARUC v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). In 1982, Congress enacted legislation codifying the regulatory status of private carriers in the land mobile services. Communications Amendments Act of 1982, §§ 331(c)(1) & (2), 47 U.S.C §§ 332(c)(1) & (2).

[14] *See* Memorandum Opinion and Order, PR Docket No. 87-312, 5 FCC Rcd 3471 (1990).

[15] National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA TELECOM 2000, p. 376 (1988).

[16] *Id.*

[17] *Id.* at 377.

[18] Cue Paging Corp. asks whether expanded eligibility on Part 90 private radio paging systems will apply to carriers offering private paging on broadcast subcarrier frequencies governed under Part 73. Comments of Cue Paging *passim*. In FM Subsidiary Communications Authorizations, 53 R.R. 2d 1519 (1983), the Commission expressly authorized paging services on FM subcarrier frequencies. Subcarrier paging operators can choose to offer paging services on either a private or a common carrier basis. Subcarrier paging operators that decide to provide private land mobile paging services are subject to Part 90 of the Commission's Rules, and are permitted to serve the broadest class of end users authorized to operate on systems licensed to Part 90 eligibles. As we permitted exclusively-licensed SMR operators to serve the Federal Government and individuals, so can subcarrier operators. *See* Report and Order, PR Docket No. 86-404, Subparts M and S, 3 FCC Rcd 1838 (1988), *aff'd* Memorandum Opinion and Order, PR Docket No. 86-404, 4 FCC Rcd 356 (1989). Service to individuals and the Federal Government on broadcast subcarrier frequencies does not raise the same frequency congestion concerns as service to these groups on shared private land mobile radio channels.

[19] We reject comments arguing that by extending end user eligibility to the Federal Government we would blur the distinction between private carriage and common carriage thereby putting the concept of private carriage in jeopardy. It is well settled that this Commission has broad discretion to modify eligibility on private systems without affecting the private status of land mobile systems. *See* Memorandum Opinion and Order, PR Docket No. 86-404, Subparts M and S, 4 FCC Rcd 356, 356-57 (1989); *see also* 47 U.S.C. § 332.

[20] We wish to clarify that in extending *end user* eligibility on paging systems we are not expanding eligibility to obtain one's own license. For example, although we are now allowing local governments to be customers on paging systems in the Business Radio Service, local governments still cannot be licensed to operate their own systems on Business Radio channels.

[21] The paging company that most closely addresses the needs of individuals, for example, argues that if permitted to serve individuals it could offer them access to regional paging networks, new technologies, and combined business/personal use of paging systems. *See* Comments of PageMart (ex parte) at 2-3. The commenter notes, however, that all of these options are currently available to individuals through common carrier systems. *Id.*

[22] Of course, individuals who need pagers for business purposes, as opposed to individuals who are simply members of the general public with no business requirements for pagers, are eligible in their own right under current rules, and our action today will not affect this policy. *Cf.* Comments of NABER at 8-9 (asking for clarification of this point).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72

CC Docket No. 80-286

In the Matter of

MTS and WATS
Market Structure

Amendment of Part 36
of the Commission's Rules and
Establishment of a Joint Board

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 20, 1990; Released: January 30, 1991

By the Commission:

I. INTRODUCTION

1. The *Bifurcation Order* required, in most circumstances, that local exchange carriers ("LECs") implement a one cent per minute originating Carrier Common Line ("CCL") charge.[1] Four petitions have been filed seeking reconsideration of that Order. After careful evaluation of the record, we deny the petitions for reconsideration and reaffirm our rule adopting the one cent rate structure.

II. BACKGROUND

2. The Commission's initial access charge rules required recovery of the costs allocated to the CCL rate element through equal per minute originating and terminating charges.[2] In 1986, however, the Commission adopted temporary measures to reduce the incentive for uneconomic bypass by freezing the terminating CCL charge, and providing that cost reductions would be used solely to reduce the originating charge. [3] By rule, this structure was scheduled to expire on December 31, 1987.[4] In response to concerns expressed by the Federal-State Joint Board, the requirement that originating and terminating CCL rates be equalized was deferred until December 1, 1988.[5] The Commission subsequently deferred the implementation of equalized CCL rates through March 31, 1989, and requested comment on whether bifurcated rates should be continued, and if so, how such rates should be structured.[6]

3. Based on the record developed in response to that request for comments, the Commission adopted the *Bifurcation Order* requiring a one cent per minute originating CCL charge, with recovery of the remaining CCL revenue requirement through the charge for terminating traffic. The Commission also required the equalization of originating and terminating charges if use of a one cent originating CCL charge would result in a terminating charge of less than one cent.[7] These rule changes became effective April 1, 1989.

4. The decision to adopt a "one cent rate structure" was based on an analysis of the effects of both equalized and bifurcated rates. Observing that there are advantages and disadvantages inherent in both options, the Commission adopted "a balanced approach that captures many of the benefits of both bifurcation and equalization, while at the same time minimizing the disadvantages of each method."[8] In adopting this rate structure, the Commission considered a number of factors, including the incentives for bypass, the ability of high cost exchange areas to attract competition from additional interexchange carriers ("IXCs"), the pricing of interexchange services, rate and customer churn, traffic flows among regions, pressure for toll rate deaveraging, revenue recovery from services using switched access on only one end, billing accuracy, and implications for the tariff review process.[9]

III. POSITIONS OF THE PARTIES

A. Petitions for Reconsideration and Supporting Comments

5. Four petitions seek reconsideration of the *Bifurcation Order*.[10] ACTA requests that we require facility-based IXCs to reduce their charges to resellers by one cent for each minute of reseller traffic that the facility-based IXCs carry, and maintain a flexible schedule for the submission of additional comments. Call America requests elimination of the originating CCL charge or a reduction of that charge to one-half cent per minute. MidAmerican asks that we initiate an investigation of the economic effects of increasing the originating CCL rate from zero to one cent. US West asks us to adopt an originating CCL rate of zero.

6. The petitioners present a variety of arguments in support of their requests for reconsideration. Several petitioners contend that the Commission's request for comments was not sufficiently specific to develop an adequate record concerning the effect of a one cent rate structure.[11] For example, US West argues that because the Commission requested comments on equalized versus bifurcated CCL rates, none of the parties focused on a one cent originating CCL rate structure with the result that the record is devoid of studies or other evidence concerning the effect of a one cent originating charge.

7. The petitioners also challenge the Commission's analysis of the conflicting concerns considered in reaching the decision to implement a one cent originating CCL charge.[12] Several petitioners argue that interexchange resale carriers would be seriously harmed by a one cent rate structure, and that many of these carriers would be forced to leave the market, harming consumers and undermining interexchange competition.[13] A number of parties also argue that a zero originating rate has been effective in deterring bypass, and allege that implementation of the one cent rate structure will substantially increase originating end bypass.[14] They also contend that the record does not contain sufficient evidence concerning the potential for terminating end bypass to warrant a reduction in the terminating charge. Several parties also allege that a one cent originating charge will result in rate churn, adversely affecting the industry and ratepayers.[15] In particular, they argue that the IXCs will have to revise the rates for switched services, forcing customers to redesign their telecommunications systems to reflect the new rate relation-

ships. These parties also question the Commission's conclusion that a one cent originating charge would allow more accurate traffic projections and facilitate billing for certain services.[16]

8. Several petitioners also challenge the manner in which IXCs propose to flow the access charge changes through in the rates for services resellers use to terminate their interexchange traffic.[17] They allege that IXCs will gain "windfall" profits since LEC collection of the originating charge will not be accompanied by equivalent reductions in IXC charges to resellers for services using terminating access.

9. Seven parties filed comments supporting reconsideration.[18] Many of these parties urge the Commission to accord the LECs a degree of flexibility in setting the originating CCL charge.[19] In particular, they suggest that we establish a range within which the LECs could set the originating charge, or propose that the Commission allow the LECs to choose an originating charge of zero, one-half cent, or one cent.[20] NTCA states that its members could accept a one-half cent originating CCL charge as a compromise, but emphasized its opposition to continuation of a zero originating CCL charge. OPASTCO states that it does not support the proposals to retain a zero originating rate, but would support a one half-cent originating CCL charge.

10. The parties supporting reconsideration also reiterate many of the basic concerns raised by the petitioners. Several parties argue that there is inadequate record support for the one cent rate structure.[21] They contend that an increase in the originating CCL rate will substantially increase originating end bypass without adequate offsetting benefits in terms of reduced terminating end bypass.[22] In addition, they argue that a one cent originating CCL charge will adversely affect services developed in reliance on the current bifurcated rate structure and may cause customers to migrate to different service offerings. A number of these parties also join the petitioners in arguing that the one cent rate structure will not enhance the accuracy of traffic measurement.[23]

B. Opposing Comments

11. Four parties oppose reconsideration.[24] Several of these parties contend that the Commission provided adequate notice,[25] and that the reseller petitions are procedurally improper since those petitioners did not participate in this proceeding prior to filing reconsideration petitions.[26] In particular, they contend that the petitioners had adequate time to perform, and present, quantitative analyses prior to the Commission decision.[27]

12. Opponents of reconsideration also argue that no new information has been presented that warrants reconsideration.[28] These parties contend that recovering the entire CCL revenue requirement from the terminating CCL charge discriminates against services that use only terminating end CCL service, and state that the one cent originating rate structure ameliorates some of the discriminatory effects that were inherent in a zero CCL originating rate.[29] These parties also argue that reseller claims of harm should be discounted since resellers recently paid originating CCL rates that were substantially higher than one cent.[30] These parties add that the *Bifurcation Decision* was based upon an adequate record, and that it demonstrates a careful balancing of conflicting public policy considerations.

IV. DISCUSSION

A. Notice

13. Several petitioners argue that the Commission did not provide sufficient notice to apprise interested parties that a specific originating CCL rate might be adopted.[31] That contention is unfounded. An agency is not required to issue further notices for comment as long as the "final rules represent a 'logical outgrowth' of the proposals."[32] While the Commission tentatively concluded that equalized charges are superior to bifurcated rates, it specifically asked interested parties to address the issue of whether bifurcated rates should be continued, as well as the amount of any originating charge in a bifurcated rate structure:[33]

> [t]o the extent parties contend that we should continue bifurcated rates beyond March 31, 1989, they should address the structure of the bifurcation scheme, *i.e.*, whether we should continue with a frozen terminating charge or move to a frozen originating charge . . . *and at what level.*[34]

In light of this language, we do not believe that the request for comments can reasonably be interpreted, as some petitioners state they did, to indicate that the Commission would focus only on the broad policy question of a bifurcated versus an equalized rate structure and not on the establishment of a specific originating CCL rate. Nor do we find persuasive the contention that this language failed to afford interested parties a full opportunity to address the merits of an originating CCL rate greater than zero but less than the level resulting from full equalization.

Adoption of such a specific level for the originating charge is a "logical outgrowth" of the request for comments on this issue. Indeed, USTA itself proposed a specific level of more than zero (one half cent) for the originating charge, absent increased pricing flexibility.[35]

B. Standing

14. ARINC argues that the resale petitioners should not be accorded standing to seek reconsideration of the *Bifurcation Order* since they did not participate in the earlier stages of this proceeding.[36] Ad Hoc also argues that these petitioners' "tactics" threaten the integrity of the Commission's processes. Section 405 of the Communications Act, however, authorizes "any . . . person aggrieved or whose interests are adversely affected" to petition for reconsideration of Commission action.[37] Thus, these petitioners have standing under the Act to seek reconsideration of the Commission's decision to implement a one cent originating CCL charge.

15. Despite this, the Commission's rules provide that requests for reconsideration relying on facts that have not previously been presented to the Commission will be granted only in limited circumstances.[38] It appears that some of the information presented in support of the requests for reconsideration could have been, but was not, presented to the Commission previously.[39] We believe, however, that public interest factors warrant consideration of this information in this instance.[40]

C. Record Evidence

16. US West and several other parties argue that the existing record is inadequate to support adoption of a one cent originating charge because there were no studies or other evidence concerning the effect of a one cent charge on bypass or on telecommunications providers and their customers. Accordingly, they argue that there is no record evidence to support the Commission's conclusion that a one cent originating charge is appropriate.

17. In notice and comment Rule Making proceedings such as this, conducted pursuant to Section 553 of the APA,[41] the Commission is required to make a reasoned decision.[42] Thus, if the commenting parties file studies concerning the effect of proposed Commission actions, we must consider these filings in our decision making process.[43] However, the Commission is not required to conduct independent econometric or other studies concerning the effect of proposed decisions. Instead, in a proceeding such as this, we are permitted to make a decision based on the arguments and information contained in the comments or otherwise before us as well as our exercise of agency expertise in evaluating these filings.[44] We believe that there is ample support for the decision.

D. Flexibility

18. Many of the LECs filing in support of the petitions for reconsideration argue that the Commission should afford them flexibility in setting the originating CCL charge, allowing the LECs complete, or at least partial, discretion to set the originating and terminating charges at levels they deem appropriate. The Commission's request for comments on whether to continue bifurcation of the CCL rate structure specifically stated that the Commission did not intend to consider broader questions concerning CCL rate flexibility.[45] Thus, the Commission correctly concluded that it would be inappropriate to address the broad question of CCL rate flexibility in the *Bifurcation Order*.

19. One of these parties, however, argues that allowing the LECs to choose between alternative originating CCL rate levels involves such a limited degree of flexibility that it falls within the scope of the notice. We do not share this view. Nor do we believe that limited flexibility should be adopted in the present proceeding even if encompassed within the request for comments. Among other things, the considerations discussed below lead us to conclude that a zero originating charge is no longer desirable even on an optional basis as advocated by the parties.[46] We also note that, in light of the Commission's statement that it would not address rate flexibility issues, the current record does not fully explore the possible collateral consequences of multiple rate structures.

E. Balancing of Competing Considerations

20. The petitioners also challenge the Commission's analysis of the various competing considerations underlying adoption of this rate structure, arguing that the Commission failed to recognize the adverse effect of this rate structure on interexchange resale carriers as well as the implications of this rate structure for bypass. We recognize that some resale carriers will experience increased access costs due to the institution of a one cent originating CCL charge, although other interexchange carriers will apparently experience decreases.[47] The petitioners allege that this will reduce carrier profitability and force resellers to leave the market. To the extent that this harm is due to reseller decisions to take advantage of market opportunities created by the zero originating charge, we emphasize that the Commission clearly stated from the beginning that use of the particular bifurcated CCL rate structure was a temporary measure.[48] Thus, we conclude that any harm to particular resellers due to their reliance on continuation of this rate structure should be accorded only limited weight. We also agree with Ad Hoc that the resellers' claims of extreme harm are difficult to credit in light of the fact that an originating CCL charge of 1.55 cents was in effect less than two years before the April 1, 1989 date for implementation of the present rate structure. In addition, we note that petitioners' claims that a one cent originating CCL charge would drive many resellers from the market, undermining competition and harming consumers have proved unfounded.[49]

21. As previously indicated, the petitioners and a number of parties filing in support of reconsideration argue that the Commission failed to recognize that a one cent originating CCL charge would substantially increase originating end bypass. We recognize that originating end bypass presently appears more feasible than terminating end bypass,[50] and that an increase in originating end charges will increase incentives for originating end bypass to some extent. We do not view this fact as dispositive, however. The pressure for bypass has been significantly reduced by the implementation of subscriber line charges which was completed on April 1, 1989. This flat rate recovery of non-traffic sensitive local loop costs allows reduced charges for interstate switched access services, making them more competitive with bypass alternatives.[51] Thus, we conclude that a one cent originating CCL charge does not create undue pressure for originating end bypass in conjunction with implementation of subscriber line charges. Furthermore, we do not believe that there has been a major upsurge in originating-end bypass due to the one cent originating charge as petitioners predicted.

22. US West and several of the other petitioners also argue that implementation of a one cent originating CCL charge will generate administrative burdens and customer churn. As certain parties anticipated, the IXCs revised their rates for switched services in light of the one cent originating charge with the result that large customers undoubtedly reassessed their communications networks to ensure that they were obtaining the best value for their communications expenditures. This is true, however, in the case of any change in access rates. We also note that these changes due to the one cent originating CCL charge have already taken place and that grant of the relief the parties request would only result in further changes in access rates and additional customer churn.

23. US West also questions the significance of certain administrative benefits cited by the Commission in support of a one cent originating charge. The Commission did note that 700, 800 and 900 services terminating on common lines are more difficult to bill properly with bifurcated charges, but recognized that the credit mechanisms developed to ensure proper billing for these services are working satisfactorily and are expected to improve. The Commission also concluded that a one cent originating charge would facilitate the tariff review process by assuring a more accurate count of originating minutes due to the billings associated with them. At the same time, however, the Commission recognized that the

problems associated with the need to estimate terminating MOUs based on originating traffic was diminishing rapidly with the implementation of equal access since terminating switched access traffic can be measured in end offices that have been converted to equal access. Thus, it does not appear that the Commission accorded undue weight to these factors.

24. In opposing the requests for reconsideration, ARINC, Ad Hoc, and ADAPSO argue that customers using services with switched access on one end have been paying a disproportionate share of switched access costs under the previous system of bifurcated CCL charges. With a zero originating CCL charge, services that use special access on one end and switched access on the other end, such as WATS and 800, pay approximately twice as much in CCL charges per minute of switched access traffic as services using switched access on both ends.[52]

25. Based on a careful evaluation of the contentions raised by the parties in this proceeding, we reaffirm the Commission's decision to implement a one cent originating CCL charge effective April 1, 1989. The dire predictions by petitioners concerning the effect of this rate structure on resale carriers and bypass have not proven accurate. To the contrary, the one cent originating charge does not appear to have undermined the vitality of the resale segment of the interexchange industry, and we do not believe that there has been a major upsurge in originating-end bypass due to the one cent charge. Nor are we persuaded to modify the Commission's decision based on the contentions concerning rate and customer churn or the limited benefits of an originating charge for increased accuracy in the tariff review process.

F. Flow Through of CCL Rate Changes

26. Several petitioners argue that the IXCs should be required to flow the reductions in the terminating CCL charge through to resale carriers or give resellers a one cent per minute credit for use of the facility-based carriers' services. ARINC also supports Commission action requiring full flow through of the reduction in terminating CCL rates, although opposing reconsideration of the one cent originating charge. Issues concerning the manner in which the changes in the CCL rate structure have been reflected in IXC rates are beyond the scope of this proceeding concerning the CCL rate structure. Such suggestions cannot properly be considered in the reconsideration of a Rule Making decision that was designed to establish or modify rules for the computation of LEC charges.[53]

V. CONCLUSION

27. For the reasons discussed above, we affirm the Commission's decision to implement a one cent originating CCL charge with the remainder of the CCL revenue requirement recovered through the terminating charge, except when this would result in a terminating charge of less than one cent. Based on the preceding analysis, and the other factors discussed in the *Bifurcation Order*, we believe that this decision represents a reasoned consideration of the advantages and disadvantages of alternative CCL structures.

VI. ORDERING CLAUSE

28. ACCORDINGLY IT IS ORDERED THAT the petitions for reconsideration of the *Bifurcation Order* ARE DENIED, and the petitions for stay ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 4 FCC Rcd 5048 (1988)(" *Bifurcation Order* "). The phrases, "bifurcation" and "bifurcated rates," describe the use of originating and terminating CCL charges that are not equal.

[2] 47 C.F.R. § 69.105 (1983). The CCL rate element serves primarily to recover the portion of local loop costs assigned to the interstate jurisdiction through the separations process and not recovered through the subscriber line charge. It also covers certain other costs, however.

[3] *See* WATS Related and Other Amendments of Part 69 of the Commission's Rules, CC Docket No. 86-1, FCC 86-115, 51 Fed. Reg. 10839 (Mar. 31, 1986) ("*WATS Order* ").

[4] *Id.* at 51 Fed. Reg. 10841.

[5] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 2 FCC Rcd 2953 at paras. 13, 27, Appendix A at para. 12 (1987) ("*NTS Recovery Order*").

[6] MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, 3 FCC Rcd 4543, at 4549-50, 4553, 4560 (1988)("*NTS Recovery Reconsideration Order*"), *aff'd Public Service Commission of the District of Columbia* v. *FCC*, D.C. Cir. No. 88-1661 (D.C. Cir. Mar. 14, 1990) In this Order, the Commission also affirmed its prior decisions concerning subscriber line charges, CCL pooling requirements, high cost assistance and lifeline benefits with several minor modifications.

[7] *Bifurcation Order*, 4 FCC Rcd 5048 at 5053 (1988).

[8] *Id.* at 5051 (1988).

[9] *Id.* at 5051-53.

[10] Petitions for reconsideration were filed by: the Alternative Carrier Telecommunications Association ("ACTA"); the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (collectively, "US West"); Call-America, Midco Communications, Inc., and Telephone Associates and Touch America, Inc. (collectively, "Call-America"); and MidAmerican Long Distance Company ("MidAmerican").

ACTA, Call-America, and MidAmerican also filed Motions for Stay of the Commission's decision to implement a one cent originating CCL charge. We dismiss those motions as moot since we are reaffirming the Commission's decision in this Order. Accordingly, we do not discuss the arguments raised in support of the requests for stay.

[11] *See, e.g.*, US West Petition at 7.

[12] *See, e.g.*, Call-America Petition at 2-10.

[13] *See, e.g.*, US West Petition at 9, Call-America Petition at 2-10.

[14] *See, e.g.*, Call-America Petition at 2-3.

[15] *See, e.g.*, Mid-American Petition at 4-5.

[16] *See, e.g.*, Call-America Petition at 4-5.

[17] *See, e.g.*, ACTA Petition at 4.

[18] These parties were: the GTE Telephone Operating Companies ("GTE"), New England Telephone and Telegraph Company and New York Telephone Company ("NYNEX"), United States Telephone Association ("USTA"), National Telephone Cooperative Association ("NTCA"), Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"), American Telephone and Telegraph Company ("AT&T") and U.S. Sprint Communications Company Limited Partnership ("Sprint").

[19] *See, e.g.*, USTA Comments at 2.

[20] *See, e.g., id.*; GTE Comments at 4-7.

[21] *See, e.g.*, GTE Comments at 1-2.

[22] *See, e.g., id.* at 3.

[23] AT&T also filed an *ex parte* letter supporting a one-half cent originating CCL charge on the ground that this would reduce the disparity between access costs as incurred by AT&T and the manner in which changes in access costs are allocated among services under the price cap rules. Letter from Douglas Dunn, Vice President, Federal Regulation Dept., AT&T, to Gerald Brock, Chief, Common Carrier Bureau, FCC, dated May 11, 1989. *See* para. 26 *supra*.

[24] Those parties were: the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), Aeronautical Radio, Inc. ("ARINC"), Contel Corporation ("Contel"), and ADAPSO.

[25] *See, e.g.*, Contel Comments at 6-8.

[26] *See, e.g.*, ARINC Comments at 1-2.

[27] *See, e.g., id.*

[28] *See, e.g., id.*

[29] *See, e.g., id.* at 8-11.

[30] *See, e.g.*, Ad Hoc Comments at 10.

[31] *See, e.g.*, ACTA Petition at 1, n.1.

[32] Action Alliance of Senior Citizens of Philadelphia v. Bowen, 846 F.2d 1449 at 1455 (D.C. Cir. 1988), *quoting* Small Refiner Phase-Down Task Force v. EPA, 705 F.2d 506 at 547 (D.C. Cir. 1983). *See also* Central Lincoln Peoples' Utility District v. Johnson, 735 F. 2d 1101 at 1118 (9th Cir. 1984)(a final rule must be sufficiently related to proposal); American Transfer & Storage Co. v. ICC, 719 F.2d 1283 at 1303 (5th Cir. 1984)("The notice need not specifically identify 'every precise proposal which [the agency] may ultimately adopt as a rule.'").

[33] *NTS Recovery Reconsideration Order*, 3 FCC Rcd 4543 at 4550 (1988).

[34] *Id.* at 4560 n.96 (emphasis added).

[35] USTA Comments at 4-5.

[36] ARINC Comments at 2 n.2.

[37] 47 U.S.C. § 405.

[38] Section 1.429 (b) of the Commission's Rules, 47 C.F.R. § 1.429 (b).

[39] The arguments concerning the effect of a one cent originating CCL charge on interexchange resale carriers, for example, appear to fall into this category.

[40] *See* Section 1.429 (b)(3) of the Commission's Rules, 47 C.F.R. § 1.429 (b)(3).

[41] This proceeding involves Rule Making rather than adjudication since it constitutes "an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551 (4). Rule Making proceedings are conducted pursuant to the notice and comment procedures of Section 553 of the APA, except when "required by statute to be made on the record after opportunity for an agency hearing" in which case Sections 556 and 557 of the APA apply. 5 U.S.C. § 553 (c). Sections 201 and 205 of the Communications Act provide, respectively, for an "opportunity for hearing" and a "full opportunity for hearing" -- language that does not trigger the applicability of Sections 556 and 557 of the APA. United States v. Florida East Coast Railway Co., 410 U.S. 224 (1972).

[42] U.S. West appears to suggest that the Commission must support its decision with "substantial evidence." While it is up to a reviewing court, not us, to apply the appropriate standard of review, we note that in informal notice and comment Rule Making proceedings such as this, which are subject to Section 553 of the APA, reviewing courts are to set aside agency actions that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). In the case of those other proceedings that are subject to Sections 556 and 557 of the APA "or otherwise reviewed on the record of an agency hearing provided by statute," the courts are also required to set aside agency actions that are "unsupported by substantial evidence." 5 U.S.C. § 706 (2)(E).

[43] As previously discussed, affected parties had ample notice of the range of options under consideration in this proceeding, and could have filed studies concerning the effect of re-instituting equalized rates -- an approach that involves more cost recovery through originating charges than the one cent originating charge eventually adopted by the Commission.

[44] American Telephone and Telegraph Co. v. FCC, 572 F.2d 17 at 24 (2d Cir. 1978). *See also* FCC v. WNCN Listeners Guild, 450 U.S. 582 at 594-95 (1981); FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 at 803-05, 814 (1978).

[45] *NTS Recovery Reconsideration Order*, 3 FCC Rcd at 4560 n.96.

[46] This is true regardless of whether LEC pricing flexibility would create additional pressure for toll rate deaveraging.

[47] The data filed by US West indicate that the number of its carrier-customers experiencing decreases in their access costs with a one cent originating CCL charge greatly exceeds the number of carrier-customers experiencing access cost increases. US West Errata to Petition for Reconsideration, dated March 13, 1989.

[48] *WATS Order* FCC-86-115 at paras. 53-55, 51 Fed. Reg. 10840-41 (Mar. 31, 1986); *NTS Recovery Order*, 2 FCC Rcd 2953 at 2964-65 (1987); *NTS Recovery Reconsideration Order*, 3 FCC Rcd 4543 at 4549-50, 4555-56 (1988).

[49] In fact it is clear that there has been no significant decline in the number of carriers providing interstate services since implementation of the one-cent originating charge on April 1, 1989. Based on data supplied by the BOCs, the Common Carrier Bureau estimated that there were 519 IXCs as of March 1989, with 274 of these carriers purchasing equal access. The Bureau estimated that, as of December 1989, there were 519 IXCs, 318 of which used equal access. "Summary of Long Distance Carriers," Industry Analysis Division, FCC, June 5, 1990, at p.6 Table 3. The Bureau implemented certain data corrections for the first time in its estimate of the number of IXCs operating in March 1990. It eliminated 37 firms reported by the BOCs as purchasers of interstate access based on the conclusion that they are purchasing access for their own internal corporate communications. It also eliminated certain other firms that the BOCs continued to list as purchasing access even though they had disappeared through mergers. After making these corrections, the Bureau estimated that there were 466 long distance telephone carriers in March 1990 with 289 of them purchasing equal access. *Id.* Thus it appears that the change in the number of interstate carriers between December 1989 and March 1990 resulted from these

data corrections rather than market exit by a significant number of long distance carriers. *See id.* at 3. The Bureau's most recent estimate is that there were 462 long distance carriers purchasing equal access as of September 1990, with 304 of them identified as purchasing equal access. Summary of Long Distance Carriers, Industry Analysis Division, FCC, December 17, 1990, at pp. 5-6, Tables 1 & 2.

[50] *See Bifurcation Order*, 4 FCC Rcd 5048 at 5052.

[51] Approximately 27 percent of local loop costs (*i.e.*, the cost of connecting the subscriber to the local telephone company central office) are presently assigned to the interstate jurisdiction. The initial access charges recovered these costs solely through charges paid by the interexchange carriers that were indirectly paid by consumers through interstate toll rates that were usually based on usage. With the implementation of subscriber line charges, end users now pay a portion of these costs directly through flat monthly charges. This has allowed major reductions in interstate toll charges.

[52] This occurs because, with a zero originating charge, the entire CCL revenue requirement is recovered through "terminating" charges. Customers that use switched access on one end pay the full terminating CCL charge for one minute of switched access usage. Section 69.105 of the Commission's Rules, 47 C.F.R. § 69.105. Customers that use switched access on both ends receive *two* minutes of switched access usage for the same charge -- the originating minute, for which they are not charged, and the terminating minute.

[53] In particular, questions concerning any differences between the manner in which access charges are billed to the IXCs and the way in which the *Price Caps Order*, 4 FCC Rcd 2873 at 3325-26 (1989), adjusts AT&T's price caps for access charge changes are properly considered in the context of petitions for reconsideration in that proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-606

In re Applications of

RAYMOND J. AND JEAN-MARIE STRONG	File No. BPH-871223MQ
Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a BARTLETT MEDIA	File No. BPH-871224MC
RICHARD P. BOTT	File No. BPH-871224ME
BELZ BROADCASTING CO.	File No. BPH-871223MI

For Construction Permit for a
New FM Station on Channel 225A
in Bartlett, Tennessee

Appearances

James J. Freeman, Michael D. Smith on behalf of Raymond J. and Jean-Marie Strong; *Marvin Rosenberg, Vincent J. Curtis, Jr., Frank R. Jazzo, David N. Roberts* on behalf of Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media; *Harry C. Martin, Cheryl A. Kenny* on behalf of Richard P. Bott; and *Barry D. Wood, Merilyn M. Strailman, Ronald D. Maines* on behalf of Belz Broadcasting Company.

INITIAL DECISION OF ADMINSTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 18, 1991; Released: January 31, 1991

1. The four applications in the caption and one other, now dismissed, for a commercial FM facility at Bartlett, Tennessee were designated for hearing on December 12, 1989. *Hearing Designation Order*, 5 FCC Rcd 339 (1990). The following issues will be decided in this decision:

1. (a) To determine whether Bartlett Media had reasonable assurance of sufficient funds to build and operate the proposed Bartlett FM facility when it certified that it was financially qualified:

(b) To determine whether Bartlett Media engaged in misrepresentation or exhibited a lack of candor about its financial qualifications.

(c) To determine in light of evidence adduced pursuant to the foregoing issues whether Bartlett Media is qualified to be a Commission licensee.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on March 20, 1990 and sessions to cross-examine the witnesses presenting written testimony were held on July 9-16, 1990. The record was closed on July 16, 1990. *Memorandum Opinion and Order*, FCC 90M-211, released July 18, 1990.

FINDINGS OF FACT

Issue 1: Bartlett Media's Financial Qualifications

3. Bartlett Media is a general partnership comprised of three general partners, Robert C. Byrd with 40% equity, Milton J. Rodgers with 20% equity, and Harold W. Byrd with 40% equity. Bartlett Media Exh. 1. The Byrds and Mr. Rodgers entered into a written partnership agreement on December 14, 1987. *Id.*

4. Robert Byrd was responsible for certifying that Bartlett Media had sufficient committed funds or net liquid assets to be considered financially qualified. Prior to responding to the financial certification question, Robert Byrd reviewed correspondence from Frank Jazzo, one of Bartlett Media's communications attorneys, which discussed the requirements of any letter from a bank. Bartlett Media Exh. 6, at 2.

5. Robert Byrd is chairman of the board of the Bank of Bartlett (the Bank). Together, Robert and his brother, Harold Byrd, own approximately 18% of the stock of the Bank, through their ownership of West Tennessee Bancshares, Inc. (WTB), a one bank holding company which was formed to acquire the Bank. WTB owns 100% of the Bank's stock. Bartlett Media Exh. 2, at 5. The board of directors of the Bank is comprised of Robert Byrd, four of his brothers and four close friends. The five Byrd brothers and the four close friends comprise 60% of the ownership of WTB and total control of the Bank. *Id.*

6. Robert Byrd approached Bruce Smith, who was then and is now president, chief executive officer (CEO), and a director of the Bank, about obtaining a reasonable assurance letter from the Bank. Smith was advised that Robert and Harold Byrd and Milton Rodgers were putting together an application for a radio station in Bartlett and needed a "letter or evidence of a line of credit" in connection with the preparation of that application. Bartlett Media Exh. 5, at 2; Tr. 787-88. Smith believed the letter did not need to be a binding commitment from the Bank, but had to provide the partners with reasonable assurance that funding would be available from the Bank. Bartlett Media Exh. 5, at 2.

7. Smith testified he knew the three were forming a partnership and therefore could have addressed a loan letter to the partnership, but did not do so because he did not have the partnership agreement or the partnership's name. Tr. 802. He noted that had a partnership actually existed, it would have been natural to address it in the

letter. Tr. 803. The Bartlett Media partnership agreement was executed on December 14, 1987. Bartlett Media Exh. 1, at 1.

8. Smith testified that in making a loan to a partnership, the bank will look at who is in the partnership and who is really "calling the shots." Tr. 804. He said that the partners told him that Milton Rodgers would run the operation. Harold Byrd would be involved in business development and sales and "Bobby would be, basically, the chairman of the board, as he is with the bank." Tr. 804-05. It is still Smith's understanding that those are the positions Messrs. Byrd and Rodgers will hold at the station. Tr. 806.

9. Smith issued a letter dated December 14, 1987 to "Robert C. Byrd, Harold W. Byrd and Milton J. Rodgers." Bartlett Media Exh. 5, at 5. The letter's heading is "Letter of Intent for financing of FM Radio Station equipment and furnishings." The text of the letter is as follows:

> Subject to appropriate documentation and verifications of a valid construction permit, the Bank of Bartlett will be interested in financing up to $200,000 for an FM radio Station for the Bartlett area.
>
> The Bank would expect an amortization of ten years at a floating rate of 1% over prime with the equipment and furnishings serving as collateral for the loan.

Bartlett Media Exh. 5, at 5; Tr. 460.

10. Smith said it was not his intent to limit the loan to the purpose in the subject heading, but said the loan would be used to acquire equipment and furnishings, as well as to provide additional working capital for a period of three to six months. Bartlett Media Exh. 5, at 3. The words "subject to appropriate documentation and verifications of a valid construction permit" meant that the partners would be required to provide the Bank information such as building permits, FCC permits and contracts with contractors, to demonstrate that the station could and would be constructed. Smith said there was nothing else required personally from any of the partners concerning their financial ability. *Id.*

11. Smith stated, in his June 7, 1990 declaration attached to Bartlett Media's opposition, that "|n|o letter was necessary as an accommodation, because Robert Byrd, as Chairman of the Board, could have himself written such a letter." A copy of the December 14, 1987 letter is, and has been since it was issued, in Robert Byrd's credit file at the bank, to document that the bank could, if Robert Byrd and his partners were to obtain the permit, make the requested loan. Bartlett Media Exh. 5, at 4.

12. Smith maintains that at the time the letter was issued, the Bank had all of the financial information it needed concerning the borrowers. The Bank had personal financial statements of Robert and Harold Byrd for every year since 1980, although at hearing he noted he could not recall if he had reviewed them. *Id.*, at 2; Tr. 807-08. Smith did not recall whether, at the time of his declaration, he saw a personal financial statement for Milton Rodgers. Bartlett Media Exh. 5, at 2. At hearing, Smith said the Bank had a 1986 statement on file for Rodgers but he probably did not review it before executing the December 14, 1987 letter. Tr. 794, 808.

13. Smith testified he was aware of banking regulations limiting loans to insiders in December 1987. Tr. 797. He said when Robert Byrd asked him for a letter he did not ask if the deal was "legal," but whether it was bankable. Tr. 801. With respect to the December 1987 letter, Smith said he planned to make three individual loans and write three individual checks, in the percentage of each partner's equity interest. Tr. 808-09. Smith knew there was a need to limit the liability of Robert Byrd. *Id.*

14. Smith now believes and believed then that the loan could be made to Bartlett Media as a partnership. Tr. 810-11. He testified that all of the loan letters provided to Bartlett Media, including the December 1987 letter, were intended to be secured by partnership assets and the funds were to be used in the partnership's business. Tr. 823.

15. When Robert Byrd received the December 14, 1987 bank letter he sent it to Mr. Jazzo asking that Jazzo let him know if any other item or information were needed. Mr. Byrd did not receive any indication from Mr. Jazzo that anything further was necessary, nor did Jazzo suggest any changes to the bank letter. Bartlett Media Exh. 6, at 2. In his June 7, 1990 declaration attached to Bartlett Media's opposition, Robert Byrd stated that there was "no doubt in his mind" that he could and can obtain a loan from the Bank of Bartlett "to cover all funds needed by Bartlett Media," noting he is chairman of the board of the Bank, part owner of the Bank, that five of the nine members of the board are members of his immediate family (four brothers and him) and that "|m|embers of the Byrd family and close friends control a majority of the ownership of the Bank." Bartlett Media Exh. 6, at 3. Members of the board include Robert Byrd, Bruce Smith, Dennis Campbell, Gary Blume, James Byrd, John Byrd, Dan Byrd, Ervin Robinson and Harold Byrd. Bartlett Media Exh. 5, at 4. Robert Byrd noted later in his June 7 declaration that "together with my family and close friends, we control the Bank." Bartlett Media Exh. 6, at 5.

16. At his deposition on May 22, 1990, Robert Byrd testified, when asked whether or not members of the board of directors of the Bank were aware of the December 14, 1987 letter, "if he had read the minutes of the Loan Committee meeting, a director would be aware of the proposed loan." Bartlett Media Exh. 6 at 3. But in his June 7, 1990 declaration, Byrd claimed that upon returning to his office he was reminded that the subject must have been raised at a board of directors meeting, rather than a loan committee meeting, since the board functions as the loan committee for all extensions of credit to directors and executive officers. Robert Byrd then claimed he specifically recalled raising the matter at a directors meeting, probably the one held December 10, 1987, but he could find no reference to that matter in the minutes of that meeting. Byrd said his remarks were not formally recorded in the minutes because an "absolute binding commitment to lend Bartlett Media and/or Harold, Milton and I the funds was not made at that meeting." He said the proposed loan "to Bartlett Media" was raised during the time set aside at the close of the meeting for consideration of loan requests from Bank directors. Bartlett Media Exh. 6, at 3. Moreover, in its opposition pleading filed June 8, 1990, Bartlett Media made several references to the letter being to "Bartlett Media," rather than to individuals. For example, at page 12 of its opposition it noted that the Bank provided the letter to "Bartlett Media." Belz Exh. 7, at 12. It also represented in that pleading that on June 6, 1990 the board of directors had

unanimously agreed to extend a loan "to Bartlett Media" and that the Bank would have made a similar commitment in December 1987 if one had been requested. *Id.*, at 3-4, 14. The applicant even represented that Robert Byrd had the authority himself "to issue a letter to Bartlett Media." *Id.*, at 4, 11. And on page 13 of the opposition, Bartlett Media noted that "Bartlett Media could obtain any necessary financing from the Bank . . . ." *Id.*, at 13. Nowhere in that opposition pleading did Bartlett Media or Robert Byrd contend that the December 1987 bank loan would be to individuals, rather than to the partnership.

17. On June 6, 1990, after Belz filed its petition to enlarge issues questioning whether the December 14, 1987 letter was an accommodation or otherwise insufficient, the board of directors of the Bank, which includes all of the same persons as the 1987 board, voted unanimously to approve a loan to the partnership. Specifically, a letter dated June 6, 1990 from Bruce Smith and addressed to "Robert C. Byrd, Milton Rodgers, Harold Byrd, a General Partnership d/b/a Bartlett Media," extends a loan commitment in the amount of $500,000 for the equipment, construction and initial operating costs of the station. The loan commitment letter -- Smith described the letter as a binding commitment -- sets forth the amount of the loan, the interest rate, the term, the collateral and the insurance required. Bartlett Media Exh. 5, at 4, 6; Tr. 508, 799. Smith stated in his June 7, 1990 declaration that "|t|he Bank could and would have issued a similar letter and/or taken similar action in December 1987 had such action been requested." Bartlett Media Exh. 5, at 4. He noted at hearing that in early June 1990 the Bank knew there was a partnership and that was the way the loan was requested. Tr. 803. Each partner would be liable for the full amount of the $500,000, regardless of his equity percentage in the partnership, according to Smith. Tr. 805-06, 824.

18. In a declaration dated June 15, 1990, responding to Belz's supplement to petition to enlarge issues, Smith stated that both the December 14, 1987 and June 6, 1990 letters contemplated loans by the bank "to the individual partners as individuals," and it was not the Bank's intention to lend the money to the partnership. Smith stated that the June 6, 1990 letter was originally written and addressed to the three partners by name but was subsequently revised and reissued to the partnership at the request of Bartlett Media's Washington communications counsel. He concluded, "This revision, however, did not affect the Bank's decision to lend the money to the individuals." Bartlett Media Exh. 8, at 2. Smith stated that on the morning of June 11, 1990, Robert Byrd and he rescinded the June 6 letter, which decision was ratified at a meeting of the bank's board of directors on June 14, 1990. *Id.* At that meeting, there was a discussion of state and federal requirements and lending limitations, including a review by the Bank's counsel of all applicable statutory and regulatory requirements. At that meeting, the board of directors approved two new extensions of credit in the total amount originally approved and reflected in the June 6, 1990 letter. One extension of credit was made in the amount of $100,000 to Robert C. Byrd. The other loan, in the amount of $400,000, was approved to Harold Byrd and Milton Rodgers, "jointly and severally." Bartlett Media Exh. 8, at 2-3. Smith stated that prior to the board decision on the June 6 letter, he participated in discussions on the legal lending limit and had recalled a federal regulation restricting loans to executive officers to $100,000, but after reviewing both federal and state regulations, could not locate any regulations that so provided. The Bank's credit review officer, a former FDIC examiner, also was instructed to research and advise the bank as to such restrictions and the only regulation she could locate was a regulation of the Federal Reserve System, Regulation O. Bartlett Media Exh. 8, at 3.

19. Smith stated that as soon as he became aware there was a $100,000 limitation in the state banking regulations he acted, together with Robert Byrd, to rescind the June 6, 1990 bank letter. When the Bank was advised by its Tennessee counsel that the bank may legally lend the funds requested to the individual partners as long as the amount extended to Robert Byrd, together with all of his indebtedness to the Bank, does not exceed $100,000, the board of directors approved the two loans of June 14, 1990.

20. In a declaration dated June 15, 1990, also provided in response to the Belz supplement, Robert Byrd stated his June 7, 1990 declaration "remains true and correct." Bartlett Media Exh. 9, at 2. Robert Byrd said in his June 15, 1990 declaration that until June 8, 1990, when he received a telephone call from communications counsel, he was unaware that the rules of the Tennessee Department of Financial Institutions limited the amount of money the Bank could lend to "me and to Bartlett Media." He stated "|i|t has always been the bank's intention to provide the funds requested for the FM radio station in loans made to the individual partners who make up Bartlett Media and not to the general partnership," and said that it was therefore "valid on its face." He also said the June 6, 1990 loan (which letter was addressed to the general partnership) was approved as a loan to the individuals. Bartlett Media Exh. 9, at 2.

21. Milton Rodgers did not recall whether he considered the December 1987 bank letter to be necessarily to a partnership or to individuals. Nor did he know if there would be more than one check for the loan. He did not know whether he would be personally liable for the entire $200,000 and did not have a number in mind regarding the limit of his liability. He said there had been no discussion between the three partners on the liability question. Tr. 1309-11. Rodgers said he did not know whether the letter was the only source of financing, but that he did not plan to use his own funds for the $200,000 to construct and operate the station. Tr. 1312-13. Harold Byrd testified the applicant was relying only upon the bank letter when it certified its financial qualifications. Tr. 1036.

22. At deposition, when asked whether the loan would be funded with money going to a partnership account, Robert Byrd said yes. Tr. 445. He claimed it did not "occur" to him to mention at deposition that the loan was to three individuals. Tr. 446. Also at deposition, when asked whether the other four members of the board of directors would be aware of the fact that the bank was making a loan "to a partnership composed of yourself, your brother, and one other person," Robert Byrd said yes. Tr. 678.

23. When pressed at hearing as to the fact that it did not make sense that a loan letter contemplating a loan to operate a partnership business, secured by partnership assets, would not be to the partnership, Robert Byrd admitted he should have said he did not recall and that it

could have been contemplated that the December 1987 loan was to be to the partnership. Tr. 702-03. Byrd testified at hearing that when the December 1987 letter was discussed at a board of directors' meeting, the loan was characterized as being to individuals and he believed that there would be a partnership formed, but no final determination about the partnership had been made. Tr. 431. Later he testified that all along it had been contemplated that there would be an option to take the loan as individuals or a partnership. Tr. 444. Still later he testified he did not recall whether it had been disclosed to the board of directors that the loan would be to three individuals as opposed to a partnership. Tr. 678. The Bank has never before lent money to a broadcast station. Tr. 680.

24. Robert Byrd testified at hearing that the loan represented by the December 1987 letter was a commitment to three individuals according to their percentages of the partnership "or thereabouts," on a 40-20-40 basis. Tr. 433-34. But when questioned how that squared with his prior testimony that there was no partnership at the time he had requested the letter, Byrd admitted he was only "pretty sure" he had described to Smith that there would be different amounts for different portions of the total loan, although he did not know whether there would be a partnership. Tr. 436. Byrd later testified that the letter would not have to be "a separate set of loans," but rather it "could have been one loan joint and several. It could have been a loan to different individuals, it could have been a loan to a partnership." Tr. 447. Still later he testified he did not mean to imply there would be joint and several liability on the loan and that there would not be. Tr. 700-01. But at the deposition, Byrd had testified that any bank lending money to a partnership would require joint and several signatures. Tr. 704. Byrd also said he felt he would have shown Smith the partnership agreement to establish a basis for the loan being prorated among individuals. Tr. 700-01.

25. Harold Byrd was a state representative from 1976 to 1982 and he served on the Commerce Committee which oversees banking. Tr. 1055-56. Robert Byrd testified he is familiar with Tennessee banking regulations limiting loans to insiders and was at the time he certified. But he now knows his view was "inaccurate." Tr. 501, 717-18. He did not discuss the loan with the Bank's attorney, although he claims he did ask Smith to check on the letter. Tr. 501.

26. Robert Byrd claimed, in his June 7, 1990 declaration, that at the same time he had obtained the 1987 bank letter, "I also had made a personal commitment to provide my own personal funds to the project. Harold, Milton, and I all agreed to use our own personal resources to provide whatever funds were necessary for the proposed FM station." Bartlett Media Exh. 6, at 4. He further stated, "I believe that our personal financial statements reflected that we had available to us all necessary funds." *Id.* He reiterated that language in his June 15, 1990 declaration, noting that the financial statements of the three indicated they had "available to us all necessary funds even if no loan was ever obtained from the bank." Bartlett Media Exh. 9, at 2. He claimed that his own personal financial statement reflected he could, if required to do so, provide all of the funds necessary to construct and operate the station himself. *Id.* Bartlett Media's opposition pleading contains similar statements, including the representation that it relied on the partners' commitment to "back up any bank financing . . . ." Belz Exh. 7, at 12. At hearing, Robert Byrd first testified that the partners were a source of committed funds for construction and operation of the station, agreeing that they would provide funds, although there had been no decision on whether it would be as loans or capital contributions. Tr. 453-54. Byrd later specifically testified that there was an agreement among the partners to come up with the $200,000 to construct and operate the station "if necessary." Tr. 686. It was only after additional questioning that Robert Byrd changed his testimony to claim that the plan was that the partners would provide only the excess between the $200,000 they estimated it likely would cost to construct and operate and the $235,000 they foresaw as a maximum cost. Tr. 461, 469, 686-87.

27. *Executive Officer.* Under Rules 0180-3-.01(3) and 0180-3-.02 of the Tennessee Department of Financial Institutions, no state bank may extend credit of more than $100,000 to any of its "executive officers" and no "executive officer" shall borrow or "otherwise become indebted" for more than that amount. Belz Exh. 4, at 1-2. Further, under Rules 0180-3-.01(4) and 0180-3-.02, no bank may extend a loan of more than $100,000 to a partnership under which one or more of the bank's "executive officers" are partners and, either individually or together hold a majority interest. *Id.* Rule 0180-3-.03 of the Tennessee Rules defines an executive officer as:

> [E]very officer of a state bank who participates or has authority to participate otherwise than in the capacity of a director, in major policy-making functions of the bank, regardless of whether he has an official title or whether his title contains a designation of assistant and regardless of whether he is serving without salary or other compensation. The chairman of the board, the president, every vice president, the cashier, secretary and treasurer of a state bank are assumed to be executive officers unless, by resolution of the board of directors or by the bank's by-laws, any such officer is excluded from participation in major policy-making functions, otherwise than in the capacity of a director of the bank, and he does not actually participate therein.
>
> Belz Exh. 4, at 2.

28. At his deposition on May 23, 1990, Harold Byrd, who claims he has a very good memory (Tr. 957-58), responded, when asked about his job title, "I've always been an incorporator and a director of the bank, but as far as an actual position at the bank, I'm the marketing person. I am the marketing functions of the bank." Tr. 958. When further asked whether he had an official position such as "vice president in charge of . . .", Mr. Byrd broke in and answered "yes." When asked what that was, his answer was "Vice President of Marketing," a position he claims to have held since 1984. *Id.* Later in his deposition Mr. Byrd testified "I'm a vice president of West Tennessee Bancshares and the Bank of Bartlett." Tr. 975. At another point in his deposition he was asked whether he would give up his position "as vice president of marketing at the bank" to work at the radio station and he said that he would. *Id.* Still later, when asked when he had decided he would "terminate [his] position as vice president of marketing at the bank," he testified that decision was made before the attorneys were hired. *Id.*

Harold Byrd admitted at hearing that he had five opportunities to correct his deposition testimony to reflect he was not vice president of marketing at the bank, but had not done so. Tr. 975-76. Later during his deposition Harold Byrd was asked whether he was "vice president for marketing of the bank?" and again responded that he was. Tr. 1000. Byrd's last acknowledgment that he was vice president of the Bank occurred when he was asked whether he was going to terminate his position "as vice president of marketing at the bank", to which he responded yes. *Id.*

29. When pressed as to why he did not correct his deposition testimony if he was not actually a vice president of the Bank, Harold Byrd testified he was not particularly concerned with titles, that he "handled the marketing duties at the Bank" and that "since all this has come up, my title actually, I think, is marketing -- is marketing director and business development officer." Tr. 986.

30. Harold Byrd claimed that his functions at the Bank are not the same as those of a vice president of marketing at a larger bank, since they would differ because a larger bank would have a larger marketing program. Tr. 977. But when asked if a larger bank had only one person who did marketing, whether that person would do what Harold Byrd does, Byrd admitted, "Yes, sir. Some of the activities would be in that, and some -- right." Tr. 978. Byrd admitted he is the sole person who deals operationally with marketing matters for the Bank. Tr. 983. Any advertising placed for the Bank would be brought to Byrd's attention "pretty soon." Tr. 985.

31. The Bank's loan committee consists of all directors of the Bank, including Robert and Harold Byrd, except Dennis Campbell. The loan committee membership also includes executive vice president Charles Tucker. The board of directors functions as the loan committee for all extensions of credit to directors and executive officers of the Bank. Bartlett Media Exh. 5, at 4.

32. A document entitled "Credit Write-Up," dated June 6, 1990, which was presented to the board of directors in conjunction with the June 6, 1990 loan commitment letter to Bartlett Media, describes Harold Byrd as "Vice President - Bank of Bartlett." Strong Exh. 5. That document is initialed by seven members of the Bank's board of directors. Tr. 818-19. Harold Byrd testified that the individuals who would type such a credit write-up would be "generally aware" of his functions at the Bank. Tr. 1005. He testified that an effort is made to ensure that a credit write-up is correct, and if a credit write-up appears to be in error, it will later be corrected by Mr. Smith or the board itself. Tr. 1007. Mr. Smith testified that the credit write-up was written by him and he was responsible for it. Tr. 816. He believes his secretary prepared the write-up and she could have come up with information on that document herself, noting "she knows the individuals involved there." Tr. 816-17, 819. Milton Rodgers testified at hearing that he has heard people in the community refer to Harold Byrd as a vice president of the Bank. Tr. 1316.

33. Harold Byrd stated in a June 18, 1990 declaration that he is not now, and has not been at any time since December 1, 1987, a vice president of the Bank or WTB. He is a director, an incorporator of the bank and a shareholder, but not an officer. Mr. Byrd stated in a declaration attached to Bartlett Media's opposition to Belz's supplement to petition to enlarge issues that in reviewing a copy of his May 23, 1990 deposition transcript, he realized he had indicated he was vice president of marketing of the bank and he held the position of vice president in both the Bank of Bartlett and WTB, "however I was mistaken." Belz Exh. 10, at 10; Bartlett Media Exh. 11, at 2.

34. In addition to being a director and incorporator, Harold Byrd owns about 8% of the stock of WTB. Bartlett Media Exh. 16, at 3. He and Robert Byrd share an office and sit next to each other. Tr. 405. They discuss their work with each other. Tr. 407-08. Robert Byrd described his brother's job as public relations head, interacting with the community a lot and acting as a liaison with the community at large. Tr. 416. Byrd testified it is likely that he and Harold Byrd have discussed policy questions outside the board room. Tr. 409-10.

35. Harold Byrd is on the personnel, marketing and loan committees. Tr. 959. The loan committee is a committee of the bank, as opposed to the personnel, special assets and other committees which are committees of the board. The loan committee is made up of all members of the board of directors plus Charles Tucker, the chief operating officer. Tr. 419, 959-60, 965-66. The loan committee has been given authority to pass on loans and make decisions on specific requests. Tr. 962-65. Robert Byrd testified that policies of the Bank are developed through the committee structure. Tr. 409. All committees are advisory except the loan committee. Tr. 622.

36. Bruce Smith reviewed the minutes of all meetings of the board of directors from 1980 to the present and testified that Harold Byrd had never been elected as a vice president or any other officer of the bank or WTB, but is employed by the bank as marketing director. Bartlett Media Exh. 12, at 2. *See also* Bartlett Media Exhs. 14 and 15.

37. B. R. Hester, who has been general counsel of the Bank for the past ten years, submitted an opinion letter that while Robert Byrd is an executive officer of the bank and, therefore, the amount of a bank loan to him would be limited to $100,000, Harold Byrd would not be considered an executive officer. Bartlett Media Exh. 7, at 2-3. Hester, who also is the personal attorney of Harold and Robert Byrd, spends very little time on bank regulations in his legal practice, has never represented a client in a bank regulations dispute, and does no general work under state or Federal banking regulations for other banks. Tr. 759, 1052.

38. Hester's opinion that Harold Byrd is not an executive officer is based upon his review of banking regulations, the December 1987 and June 6, 1990 bank letters, the fact Harold Byrd has not been elected an officer of the Bank or WTB, and that he knows who he deals with at the bank and "its not Harold." Tr. 762, 766-67. Hester was aware, in issuing his opinion, that Harold Byrd shares an office with Robert Byrd. Tr. 762-63. But Harold Byrd's deposition testimony did not enter into Mr. Hester's determination. Tr. 779-80. Hester agreed that the Bank's directors would generally know who the Bank's officers are. Tr. 764. He also agreed that someone who did not actually have the title of vice president but functioned as a vice president could be considered as an executive officer. Tr. 769-70. But he later claimed that even if every director believed Harold Byrd was a vice president, that would not be sufficient to make him an executive officer. Tr. 771.

39. When asked whether a pledge of assets as security for a loan could constitute an instance of being "otherwise indebted" to the Bank under Tennessee state regulations, Hester said he supposed that it could be. Tr. 772. But when asked whether the fact Robert Byrd is a partner of Bartlett Media, which would pledge the partnership's assets as collateral for a loan to Harold Byrd and Milton Rodgers would violate those regulations, Hester said he did not know that it would. Tr. 772-73. Hester admitted that under "certain circumstances" if a bank loan was to be used for partnership business and the loan was made to the partners, that loan could be considered a loan to the partnership. Tr. 782-83.

40. Hester testified that the Bank could not make a $200,000 loan to Robert Byrd. Tr. 783. But he said his opinion letter that a loan to Bartlett Media could not exceed $100,000 was too restrictive, and that the entire loan could be made to the partnership. *See* Bartlett Media Exh. 7, at 2; Tr. 754.

41. Ted M. Hayden, an attorney with Less & Scroggs in Memphis, also provided expert testimony concerning Harold Byrd's status. Hayden has specialized in representing financial institutions in claims under fidelity bonds and director and officer liability insurance policies. Belz Exh. 5, at 1. In his practice he had occasion to consider numerous banking regulations as they relate to losses on loans, including insider loans governed by Federal Regulation O. *Id.*

42. Based upon the regulations, his experience, the deposition testimony of Harold Byrd, and a statement by a Bank employee that Mr. Byrd "called the shots" on charity functions and other marketing decisions, Mr. Hayden came to the conclusion that Mr. Byrd is an "executive officer" of the Bank under the Tennessee Rules. Mr. Hayden based his opinion in part on the fact that Mr. Byrd, through his approval of marketing options for the Bank, is in charge of policy concerning the profile maintained by the Bank in the community, and that he serves on the loan and special assets committees, which interpret and apply internal loan policies. Belz Exh. 5, at 2. Having a policy making function is sufficient, according to Hayden, to classify a bank employee as an executive officer under the Rules. Tr. 924. For example, he noted that a director who acts as a loan officer could be considered an executive officer. Tr. 925. Impact on any policy important to the health and welfare of a financial institution is relevant in determining who is an executive officer. Hayden cited marketing as one of the most important policy areas. Tr. 930.

43. Mr. Hayden's opinion that Harold Byrd is an executive officer of the Bank is reinforced by the initialing, by the members of the Bank's board, of the credit write-up describing Harold Byrd as a vice president. Tr. 904.

44. Hayden believes that being on a loan committee could be considered a policymaking function, particularly if the members of the loan committee also constitute the board of directors and set loan policy (Tr. 917) which is the case at the Bank (Tr. 919, 934).

45. When asked to identify those portions of Harold Byrd's deposition testimony which led to his conclusion that Byrd "called the shots" on marketing, Hayden pointed to Byrd's testimony, "I'm the marketing person, I am the marketing functions of the bank" (Tr. 938), and "I act independently or try to act independently in most things I do," noting this was the reason the Bank was successful (Tr. 939).

46. Hayden testified there also is a significant issue under Federal regulations as to whether Bartlett Media's assets could be pledged to secure loans to Harold Byrd and Milton Rodgers even if Harold Byrd is not an executive officer. Tr. 905. Bruce Smith testified that if Robert Byrd were to provide a personal guarantee on a Bank loan, that guarantee would be limited to $100,000. Tr. 797.

Issue 2: Comparative Proposals

Full-time participation in station operation by owners.

Strong

47. The Strongs represent that they will operate as a general partnership organized under the laws of the State of Tennessee and each partner will hold 50% of the equity and 50% of the voting rights. Strong Exh. 1, at 1. The Strongs' partnership agreement became effective on December 16, 1987. Strong Exh. 2, at 1. The Strongs' April 4, 1990 integration statement represented that the applicant was owned by two individuals who are "husband and wife" each owning 50% of the applicant and having an equal voice in its affairs. Bott Exh. 2, at 1-2. The Strongs represented in their integration statement that there was no written agreement incorporating their arrangments. *Id.*, at 2. However, in response to a document request, the Strongs found a partnership agreement that they had forgotten existed. Strong Exh. 3, at 2.; Tr. 92, 137. When Raymond Strong completed Form 301, his counsel, Stanley Emert, told him to check the "general partnership" box, which he did. But he described his interest on the application as "joint tenant with spouse." Tr. 51.

48. Mr. Emert recommended that the Strongs form a general partnership in a December 23, 1987 letter which enclosed a partnership agreement he had drafted. Tr. 37, 155, 231-32. Mr. Strong did not ask Emert why he recommended a general partnership. Tr. 39. Jean-Marie Strong testified at hearing that she believes she and Raymond discussed the partnership agreement on the telephone with Emert, but at deposition she testified she had not done so. Tr. 232-34. Ms. Strong explained at her deposition that she did not ask questions of Emert because she figured if her spouse had any questions, he would have asked them. Tr. 235-36. Raymond Strong did not recall any significant discussions about the agreement with Emert. Tr. 45-46, 93-95.

49. The Strongs maintain that the partnership agreement will govern the operation of the station. Tr. 152, 334. But Raymond Strong testified that they have not taken any steps required by the agreement. Tr. 95. The agreement provides that a partnership bank account will be established, but none has. Tr. 42-43. They also have not created books of account required by Article Eight, nor have they conducted a general accounting as required by Article Nine. Strong Exh. 2, at 4; Tr. 103. The Strongs demonstrated that they knew almost nothing about the agreement. For example, Article Sixteen provides that no partner may fire an employee without consent of the other partner except in the case of "gross misconduct," but Raymond Strong stated that both he and his spouse had authority individually to hire and fire if the situation warranted. Strong Exh. 2, at 8; Tr. 105. Raymond Strong

also maintained that there was no reason he could not receive a salary from the station, while Article Twelve of the agreement provides that no partner shall receive a salary. Strong Exh. 2, at 6. Tr. 100-01. Raymond Strong does not know whether Tennessee requires the filing of a partnership agreement nor did he ask about that matter. Tr. 42.

50. The Strongs first learned about the availability of the Bartlett allocation in October or November 1987 from Charles Thompson, someone Raymond Strong had met through his involvement with the Mid- South Fair. Strong Exh. 3, at 1; Tr. 174. Raymond Strong had never expressed an interest in broadcasting to Thompson, and he did not ask Thompson, who owned a radio station, why he called him about the Bartlett allocation, or whether Thompson had called other people about the allocation. Tr. 30-31, 68-69. The Strongs agreed to pay Thompson a flat fee for legal, engineering, and filing fees to file the application. Strong Exh. 3, at 2. Part of the fee was retained by Thompson as payment for telling the Strongs about the allocation and for locating legal and engineer assistance. Tr. 35, 76.

51. Raymond Strong does not even know how much was paid for legal or engineering services. Tr. 38. Thompson paid those fees. Thompson recommended the Strongs' legal counsel, Stanley Emert, and he contacted Emert for them. Tr. 32-33. He also recommended Dwight Magnuson as their engineer and contacted him. Tr. 33-34. When Emert wrote to Strong about the application he sent a copy to Thompson. Raymond Strong never inquired about why Thompson received a copy of the letter. Tr. 69-70. Ms. Strong never called Thompson about the application and never spoke with the engineer. Tr. 66, 226, 229. Mr. Strong dealt with Magnuson, Emert and Thompson. Ms. Strong did listen to telephone conversations, once or twice, between Messrs. Strong and Emert. Tr. 231, 237.

52. Ms. Strong was not involved in preparing the budget for the station; she did not participate in the conversation Raymond Strong had with his mother about the availability or cost of the Strongs' transmitter site; she was not involved in obtaining a bank loan letter. Tr. 254, 291-92, 146, 242-44, 67-68, 145-46, 246, 253. Raymond Strong established the public file. Tr. 136, 301. Most of the EEO statement included in the Strongs' application uses the pronoun "I," such as "[w]hen I recruit prospective employees." Tr. 64. There is only one use in the EEO statement of the pronoun "we." Tr. 65. When documents were produced, Raymond Strong gathered them. Tr. 295-96. All mail for the application goes, not to the Strongs' home, but to Raymond Strong's office at National Pressed Steel, a company he owns. All of the partnership records, including checks and materials sent by counsel, are maintained at Raymond Strong's office. Tr. 145, 252-53, 305.

53. In early 1988, after the application had been filed, Thompson recommended to Raymond Strong that he get in touch with Robert Blow to obtain information regarding station costs and radio operation. He claimed that Blow had experience in such matters and could advise Strong. Tr. 71-72, 178. Thompson introduced them and Blow has been advising the Strongs ever since. Tr. 73, 79, 178. Blow operates R. B. Management Company, which does "communications work," although Raymond Strong does not know what that entails. Tr. 180. While Raymond Strong said he knows Blow put applications together before, he did not ask which ones. Tr. 126. He knows that Blow's father once owned a station in Jackson, Tennessee and that Blow worked there either in management or as a disc jockey. Tr. 127, 179, 200.

54. Blow recommended that the Strongs hire James Freeman as counsel. Tr. 71-72. Mr. Freeman also represents a Jackson, Tennessee applicant in which Blow has an interest, although Raymond Strong did not know that at the time. Tr. 80, 205. Raymond Strong met Mr. Freeman in Mr. Blow's office and had a general discussion with them about the Bartlett application. Tr. 86. Soon thereafter, on March 1, 1988, Freeman wrote Raymond Strong about his fees and, although Strong did not ask him, Freeman sent a copy of that retainer letter to Blow. Tr. 79-81, 85, 205. Raymond Strong has discussed every step of his application with Blow, including advice on the hearing, Mr. Freeman's fees, and the financial details of the application. Tr. 203-04. Blow expects to receive a fee of $5,000 for his services. Tr. 82. The payment depends on the amount of time Blow spends, but Raymond Strong does not know what the hourly fee will be. *Id.*

55. Blow also has gotten Raymond Strong to participate as a 37.5% partner in a Jackson, Tennessee FM application in which Blow has an interest. Tr. 72, 86. Blow and his father are also limited partners in that proposal. Tr. 73. Raymond Strong knows only that the general partner is a minority and used to work at Blow's father's station "in the office." He neither knows nor has asked what she did at the station and when she was employed there. Tr. 73-75. He does not know what percentage equity she has, does not know and has never asked whether she has contributed funds to the applicant, does not know whether she has ever been in business for herself and does not know her age or name. Tr. 73, 87-89, 201. Although Strong represented that he joined the Jackson application because Blow told him it would be a good investment, he could not recall any specific information about how much of a return he would receive. Tr. 182-83.

56. Ms. Strong met Mr. Freeman in June 1988, after Raymond Strong first met him. While she has been in on conversations between Mr. Freeman and her spouse, she has not spoken with Mr. Freeman alone. Tr. 338, 341, 343. These conversations involved preparation of the integration and diversification statement and depositions and hearing appearances. Tr. 341. Ms. Strong participated in the hearing, deposition sessions, and listened in on one or two conversations between Mr. Emert and Raymond Strong. But her participation in the Strong's application has been limited to discussions with her spouse. Tr. 301-02. Raymond Strong could not recall one single thing his spouse had done.

The Integration Proposal

Quantitative

57. Raymond Strong proposes to serve as general manager. He represents that he will oversee the station's day-to-day operations, implementing station policies, approving programming, and supervising sales, for 40 hours per week. Strong Exh. 3, at 5. Mr. Strong did say during his deposition that he intends to hire a station manager, someone more skilled in station operation than he is. Tr. 210. Mr. Strong has not worked 40 hours per week since 1985. Tr. 214. He now intends to work 40 hours a week on an average, some weeks more, some

weeks less, depending on what is required. Tr. 121. If he could, he would work less than 40 hours per week at the office. Tr. 122. Mr. Strong has other business interests which he will end if they conflict with his operation of the station. Strong Exh. 3, at 5.

58. Mr. Strong currently is the managing partner and owner with his sister of the Fulenwider Trust Company. Strong Exh. 3, at 2; Tr. 146. Fulenwider is a land owner and sells sand and timber. Strong Exh. 3, at 2-3. Mr. Strong will remain managing partner and spend five to ten hours per month. Strong Exh. 3, at 3; Tr. 146-47. Mr. Strong is 100% owner and president of National Pressed Steel. The company engages in warehousing and selling steel and wire products. Strong Exh. 3, at 3. Raymond Strong's mother, wife, niece, and three other employees are the only people involved in the business. Strong Exh. 3, at 3. Mr. Strong maintains his office there and spends most days there even though he is "not primarily working on plant business." *Id.*, at 3-4. When the office manager left last January, Raymond Strong and his spouse had to fill in. Now that he is training his niece as a replacement, Mr. Strong claims that he spends 5-10 hours per week. *Id.*, at 4. During his deposition he said it was 30 hours per week. Tr. 110. The two statements are consistent, he said, because he does other things for the remaining time, including collecting antiques, building signs for the subdivision, working on Fulenwider business and watching his children. Tr. 110-11, 113. In fact, he says that only six to 12 of the hours are spent working. Tr. 111. Mr. Strong believes that by the end of this year, he will spend only an hour or two per week on Pressed Steel work if Strong receives the Bartlett license. Strong Exh. 3, at 4.

59. The Strongs also own 50% of Windover Galleries, a residential design firm located in Venice, Florida. They are two of the three directors. Raymond Strong represents that he and his spouse do not work there on a regular basis. Strong Exh. 3, at 4; Tr. 116. The Strongs have a home in Sarasota, Florida and combine Windover business with trips to their Sarasota home. Strong Exh. 3, at 4; Tr. 116. Mr. Strong represented that in the last six months he spent, on an average, "two days per quarter" in Florida on Windover business and an additional two to four hours per week on the telephone about the business. Mr. Strong stated that he expects the amount of time to decline in the future. Strong Exh. 3, at 4-5.

60. Mr. Strong spends four to five weeks in Florida during the summer and three to four weeks there at Christmas. Sometimes he goes to Florida in the spring. Tr. 117. Jean-Marie Strong spends six to seven weeks in Florida in the summer, in addition to the three to four weeks at Christmas and occasional spring trips. *Id.* Ms. Strong said that she and her spouse spend two months a year in Florida. Tr. 297. Raymond Strong stated that they would not spend as much time in Florida but that they have no plan to sell their home. Tr. 117-18. The Strongs also have no plans to divest their interests in Fulenwider, Pressed Steel or Windover. Tr. 114.

61. Ms. Strong proposes to work full time as the station's office manager/public affairs director. Strong Exh. 4, at 4. In Article Three of the partnership agreement it is stated that Ms. Strong will be business manager of the partnership and have charge of the office and keep the books. According to the partnership agreement she will have "concurrent charge of all financial details," including collection and receipt of money due and payment of money. Strong Exh. 2, at 2. Mr. Strong said that he and his wife have discussed the duties listed in the partnership agreement and that it is still their intent that Ms. Strong will have those functions. Tr. 98-99. The "concurrent" responsibility for financial details means, he explained, that she will supervise a bookkeeper "if we go that far and expand that much." Tr. 99. Otherwise, Ms. Strong will perform this job without help. *Id.*

62. In the integration and diversification statement filed April 4, 1990, Strong represented that Ms. Strong would serve as office manager/public affairs director. In this position, she would supervise all financial record keeping and develop and implement the station's budget; in addition, she would represent the station in the community, develop information on local needs and interests, establish procedures for and supervision of public service announcements on behalf of local groups and would be in charge of developing and supervising public affairs programming. Bott Exh. 2, at 2-3. The statement represents that the Strongs will jointly set station policies, develop the budget, select persons to fill important staff positions and supervise implementing the EEO program. *Id.*

63. In her written testimony Ms. Strong states that as an office manager she would supervise the financial affairs of the station and work with banks and auditors. With Mr. Strong she will oversee development and implementation of the budget. Strong Exh. 4, at 4. She describes her role initially as one where she would "prepare budget estimates based on historical expenses and revenues by department." With Mr. Strong she will finalize the budget. She will also track the budget. *Id.*

64. When Ms. Strong was asked why the integration statement stated that she alone would oversee development of the budget and its implementation while the written testimony indicates Mr. Strong will also be responsible, she "guessed" that she, Mr. Strong, and Mr. Freeman decided it would be better if both of them were responsible for those duties. Tr. 308. She was also asked why her hearing testimony said she would oversee financial affairs and the integration statement referred to overseeing financial "record keeping." She said the two terms were the same and she believed her counsel, Mr. Freeman, may have changed the language. Tr. 308-09. She could not explain why the integration statement represented she would approve purchases but her written testimony did not. She had not discussed the change with Mr. Strong or Mr. Freeman. Tr. 309-10.

65. Ms. Strong's past jobs have been primarily as a bookkeeper but at the station she proposes to supervise a bookkeeper rather than perform the task herself. Tr. 312. She does not know whose idea that was. The bookkeeper will also have receptionist and secretarial duties. Tr. 322. Mr. Strong said that Ms. Strong's duties at the station will be basically the same as those she had at Pressed Steel, except that "at such time as [they] could add a bookkeeper" she would supervise that bookkeeper. Tr. 120. But until that time, he stated, Ms. Strong would be the station's bookkeeper. Tr. 121. Ms. Strong has never planned or implemented a budget nor done tax returns for Pressed Steel. She just keeps records of income and expenditures. Tr. 133-34, 149.

66. It was Mr. Freeman who recommended to Ms. Strong that she be public affairs director for the station and told her what her duties would be. Tr. 289-90, 317. Ms. Strong sees that job as being one where she would be involved with the community and meeting with community leaders and organizations. Tr. 314-15. She would

report to the station manager or the general manager. Tr. 314. Ms. Strong said at her deposition that she would be involved with the station's EEO program, although she had not thought about it before the application was filed. Tr. 315. But at the hearing she suggested she may have helped her spouse prepare it by suggesting a women's organization to be included as a contact. She admitted her spouse may have thought of the organization by himself. Tr. 316-17.

67. Ms. Strong has worked on and off at Pressed Steel since 1966. Tr. 259. She has not worked 40 hours per week at the office since 1968. Tr. 324. From 1968 until 1975, she worked one or two days per week and "more nearly full time" from 1975 to 1980. Strong Exh. 4, at 1-2; Tr. 323-24. She worked a minimum number of hours from 1980 to 1984 and in 1984 started working two days per week. Strong Exh. 4, at 2. But in January 1990, she returned to full-time bookkeeping because the office manager left. Tr. 251. She has been training a niece and she plans on not working at all, or at least not "on any significant basis" in the future. Strong Exh. 4, at 2; Tr. 303.

68. Ms. Strong said that since her children will be in school full time, she will be free to work full time again. Strong Exh. 4, at 2. But she conceded she could do that now since her children are already in school full time. Tr. 304.

Qualitative

69. Raymond Strong has lived in Memphis, Tennessee, within the proposed service area, for 24 years. He intends to continue residing within the service area if the Strongs' application is granted. Strong Exh. 3, at 1. He has been involved in civic activities in the service area but none in Bartlett. Strong Exh. 3, at 6-7; Tr. 138. Since 1971, Mr. Strong has been a member of the Kiwanis Club. Strong Exh. 3, at 6; Tr. 139. Initially, he attended lunch and dinner meetings but since the early 1970s he has only contributed to a scholarship fund, and most recently, he has been inactive. Tr. 138-40, 186. From 1971 to 1982, Raymond Strong served as president, a board member and held other positions with the Sheltered Occupational Shops, which provides training for retarded persons. Strong Exh. 3, at 6; Tr. 169. From 1971 to the present, he has been an advisor, director and a certificate holder of the Mid-South Fair. Strong Exh. 3, at 6. From 1972-1973, Mr. Strong was treasurer of the West Tennessee Historical Society. Strong Exh. 3, at 6-7. He belonged to a church where he has been a member of the vestry and a lay reader from 1977 to 1980, co-chair of the Dorcus Guild from 1977 to 1978. Strong Exh. 3, at 7; Tr. 140. In 1972-1974, Mr. Strong was House Manager for the Little Theatre. Strong Exh. 3, at 7.

70. Ms. Strong has lived in Memphis, Tennessee for 24 years and she intends to continue living there. Strong Exh. 4, at 1. From 1968 to 1970, according to the integration statement, or 1972 to 1974, according to her written testimony, she was chairperson of the Cotton Carnival Children's Court. Bott Exh. 2, at 4; Strong Exh. 4, at 6; Tr. 222, 318. From 1978 to 1979, she was president of the women's group at her church. Strong Exh. 4, at 6; Tr. 287. From 1968 to the present, she has been a member of the DAR. She is not active and only pays dues. Tr. 287. From 1981 to the present, according to her written testimony, and 1978 to 1988 according to her integration statement, she has been a member of the Lakewood Hills Garden Club, a social club. Strong Exh. 4, at 6; Bott Exh. 2, at 4; Tr. 287. She has held offices in the past but this year she has not been active. Strong Exh. 4, at 6; Tr. 318.

71. From 1988 to the present, she has been a member of the Association for the Preservation of Tennessee Antiquities, although she has not attended any meetings this year. Strong Exh. 4, at 6; Tr. 288. She has been a volunteer instructor at her children's school. During 1989-1990, she spent five hours on this activity. Strong Exh. 4, at 6; Tr. 320.

Bartlett Media

Quantitative Proposal

72. Bartlett Media is a Tennessee general partnership with three partners, Robert C. Byrd, Milton J. Rodgers and Harold W. Byrd. Bartlett Media Exh. 1. Harold and Robert Byrd, who are brothers, each own 40% of the equity in the partnership and Mr. Rodgers owns 20%. *Id.* Each partner proposes to work full time at the station.

73. Robert C. Byrd proposes to work full time as programming and community affairs director. Bartlett Media Exh. 2, at 2. He would spend 40 hours per week during normal business hours. *Id.* Mr. Byrd would "maintain complete discretion and authority" over programming, news, public affairs, music selection, and format. He would supervise employees involved in programming and would be responsible for "community outreach efforts." *Id.* Mr. Byrd represents that he will retain all his current business interests but he will adjust his schedule to work full time at the station. Bartlett Media Exh. 2, at 2. Mr. Byrd has a 10% ownership interest in West Tennessee Bancshares, Inc. which owns the Bank of Bartlett and Bartlett Mortgage Company. Bartlett Media Exh. 16, at 3. Mr. Byrd is chairman of the board of the Bank and mortgage company. Bartlett Media Exh. 2, at 2, 5-7. He is a part owner, director and chairman of the board of Bartlett Travel. *Id.* And a 37.5% owner of Tyler, Rasberry and Byrd. Bartlett Media Exh. 1, at 1. Mr. Byrd will continue to attend board of directors meetings and committee meetings and his marketing efforts for the bank. Tr. 727. He will attend loan committee meetings once a week, for 1 to 1 1/2 hours each (Tr. 633, 725, 726); board of directors meetings once a month for 2 to 2 1/2 hours, including preparation (Tr. 644-45, 648, 725-26); and special assets/executive committee meetings once a month for 1 1/2 hours. Tr. 647, 726. Mr. Byrd will continue to make policy for his other business interests and he believes all his other business activities will take from five to a maximum of twenty hours per week. Bartlett Media Exh. 1, at 2-3. These activities will take place primarily during evening and weekend hours. Occasionally he will attend breakfast meetings. Any activity that affects his ability to perform his responsibilities at the station will be stopped. Bartlett Media Exh. 2, at 3. He also intends to spend more time with his three small children. Tr. 651-52. He explained, when asked whether he would spend more than 40 hours at the station, that he was "not going to spend a lot more than 40 hours a week other than the normal sense of the business day." Tr. 661-62.

74. Mr. Byrd, who has never worked at a broadcast station, could not explain why his small station would need a program director. Tr. 599-601. He stated that people associate him with the success of the bank and consider him more significant than other directors. Tr.

617-18. He has not told everyone that he would be a full-time employee at the station and he never discussed getting out of banking with Milton Rodgers. Tr. 620, 1337. Mr. Byrd is the managing partner and 5% owner of the real estate development project, Summerdale Estates. Bartlett Media Exh. 2, at 7; Tr. 629. He stated that while in May 1980 he worked 16 hours per day on the Summerdale Development (Tr. 630), he claims that the project "should not" require any time commitment from him. Bartlett Media Exh. 2, at 7. His view is based on how long it will take to sell the 30 lots that are left to sell. At the deposition sessions in May he estimated 60 days but at the hearing in July he estimated 90 days. Tr. 730, 741-42. There had been rain, he explained, which resulted in the lots not selling. Tr. 743. He did concede that "a good bit" of his time was spent on Summerdale currently. Tr. 626-27, 630.

75. As chairman of the bank, Robert Byrd does not report to anyone except the board of directors. Tr. 1034. The chief operating officer (or executive vice president and cashier) reports to the chief executive officer, who in turn reports to Mr. Byrd. Tr. 680-81. Mr. Byrd believes his $107,000 base salary at the bank will decrease by $40,000 when he goes to work at the station. Tr. 679-80. He estimates that his salary will then be $60,000 to $70,000. Tr. 735. He received this salary once before when he worked full time at Prudential-Bache and spent about 30 hours per week at the bank. *Id.* On the other hand, his brother, Harold, when he works at the station, will receive no salary except his $12,000 for being a bank director. Tr. 1030-31, 1065, 1072.

76. Milton Rodgers proposes to work full time, 40 hours per week during normal business hours, as the general manager of the station. He would oversee construction and day-to-day operations and management. Bartlett Media Exh. 3, at 1. Mr. Rodgers stated he will have ultimate responsibility and authority for all management decisions and for all departments of the station, as well as be responsible for administration and implementation of the EEO program. Bartlett Media Exh. 3, at 1-2. At the same time, Mr. Rodgers stated that Robert Byrd would select the programs, have community and public affairs duties and, because of his general business experience, help the station with its business. Tr. 1304. Mr. Rodgers said that Robert Byrd's salary would depend on "what roles we have Bobby functioning in. Program director position, occupied by someone like Bobby, could be a wide range of activities." Tr. 1307-08. He conceded that there had been no program director or community affairs director at the stations where he had worked. Tr. 1104-05. He testified about his own ideas for public service programming but he has not discussed them with Robert Byrd. Tr. 1333.

77. Mr. Rodgers currently works for Mid-South Fair and Liberty Land, a Memphis amusement park and fair. He is paid $61,000 per year. When the fair is held in September, he works 70 hours per week. Tr. 1105-07. He stated during discovery that he would maintain a part-time relationship with Mid-South Fair. Tr. 1109, 1131. He agreed that sometimes he could work 50-55 hours per week at the station and other times cut back to 30-35 hours so he could devote time to the fair. Tr. 1119-20. In the integration statement, Rodgers said he would have no other employment and in his written testimony, he indicated that he had "no current plan to continue other employment." He explained that he could engage in other part-time business. Tr. 1109-11. He has not told his employer he would leave if Bartlett Media receives a grant. Tr. 1113. He also said he might engage in real estate part-time. Tr. 1112-13. He believes his salary would be $50,000. Tr. 1128.

78. Harold Byrd proposes to work full time, 40 hours per week, as the general sales manager. He would direct and supervise all sales, marketing and promotional activities and supervise employees who would perform sales and promotion jobs. Bartlett Media Exh. 4, at 1-3. Harold Byrd will retain his other business interests and adjust his schedule. He will attend board and committee meetings of Western Tennessee Bancshares, Bank of Bartlett, Bartlett Mortgage Company, Bartlett Travel and Tyler, Rasberry and Byrd. These activities will take 5-15 hours per week. Additional interests may add five hours to that estimate. Bartlett Media Exh. 4, at 2. He now makes $62,000 at the bank but, unlike Robert Byrd, he will not receive a bank salary at the radio station. Tr. 1031.

Qualitative Proposal

79. Robert Byrd lived in Bartlett from 1961 through 1970 and since then, except for a period during 1970, he has lived within the proposed service area. Bartlett Media Exh. 2, at 1. He is active in Bartlett community activities. Bartlett Media Exh. 2.

80. Milton Rodgers has resided within the proposed service area of the station since 1950, except for the periods 1973 to 1975 and 1980 to 1985. Bartlett Media Exh. 3, at 1. Mr. Rodgers represented in his written testimony that he was general manager of WZXQ(FM), Canton, Mississippi and WXAI(AM), Gluckstadt, Mississippi from July 1982 to August 1985. Bartlett Media Exh. 3, at 4. However, when examined, he stated that WXAI(AM) was not acquired until late 1984 or early 1985. Tr. 1080. In addition, he conceded that from September 1982 to early May 1983, WZXQ was off the air and the station had no employees. Tr. 1080, 1081, 1082-83. He also worked as general manager of the Lamar Theater from September 1982 to the end of 1982. Tr. 1081, 1084, 1086. He resumed his duties as station manager in June 1985 when he returned from a trip. Tr. 1083. The owner of the station was very active in the operation of the station and spent 40 hours per week there. Tr. 1086-87. The owner did his own FCC filings and reviewed program lists, engineering and leases. *Id.* Mr. Rodgers could not recall whether he was station manager or general manager when questioned. It was his first and only broadcast position which he got when his employer at the Lamar Theater purchased the station in 1982. Tr. 1080-81. They had an agreement that he would obtain a percentage of the profit from the sale of the station. Tr. 1088. The station operated at a loss and there was only a small profit when the station was sold. Tr. 1089. When he went to Mid-South Fair from the stations, he got a 50% salary increase. Tr. 1089-90. Mr. Rodgers belongs to a church in the service area and since 1987 he has belonged to various community groups within the service area. Bartlett Media Exh. 3. He also belonged to the board of a drug rehabilitation facility in 1970-71 when he was a college student. Tr. 1317-18.

81. Harold Byrd lived in Bartlett from 1961 to 1972 and since then he has resided in the service area. Bartlett Media Exh. 4, at 1. Harold Byrd has been active in Bartlett community affairs since 1976. Bartlett Media Exh. 4, at 4-9.

Richard P. Bott

Quantitative Proposal

82. Richard P. Bott is an individual applicant. Bott Exh. 1, at 1. Mr. Bott proposes to work full time, 40 hours per week, as the general manager. *Id.* He would oversee the day-to-day operations of the station, including programming, sales, financial and personnel matters. *Id.* Mr. Bott and his spouse own Bott Broadcasting Company, which directly or through other entities holds licenses or permits for seven radio stations. Bott Exh. 1, at 3-5, Attachment A. When Bott Broadcasting Company was granted the permit for KCCV, Overland Park, Kansas, Mr. Bott promised that he would manage the station on a full-time basis. But he has never worked at the station. Tr. 1739. Mr. Bott claims that neither he nor his spouse, who also proposed to work at the station, made good on their promise because after they made it, they experienced a change in lifestyle. "[O]ur lifestyle changed, our thoughts about the future changed, and we simply were not available at that time to do that . . . ." Tr. 1742. Nothing had actually happened, however, that required a change of plans, the Botts simply decided they did not want to manage the station. Tr. 1742.

83. When Mr. Bott was asked to explain the difference in his attitude with respect to the Bartlett facility, he said that he viewed things differently now from what he thought about Overland Park. Tr. 1743. He represented that he and his wife had been thinking about leaving Kansas City for the "sunbelt area of the mid-south." He explained that now is "the time when you want to do more of what you enjoy and less of what you don't enjoy." Tr. 1743. He said he would like to interact with people and become a part of the community. Tr. 1743.

84. Mr. Bott testified that the Commission was notified prior to the grant of the Overland Park construction permit that he and his wife would not be integrated after all. Tr. 1744. The application was granted in January 1986 and the Commission was not advised of Mr. Bott's change of plans until 1 1/2 years later on May 22, 1987. Tr. 1746.

85. Mr. Bott conceded that neither he nor his spouse had worked at the Overland Park station. Tr. 1739-40. They live at the same address, within the service area, that they did when they applied. *Id.* It is about a 20-30 mile drive from their home to the Overland Park station. Tr. 1741. The Overland Park station, which has fewer than five full-time employees, does not currently have a station manager. Tr. 1750.

86. At his deposition, Mr. Bott testified that he had not visited Bott Broadcasting's Oklahoma City station, KQCV, for at least two years. Tr. 1751-52 He stated that he had not visited Bott Broadcasting's Fort Wayne, Indiana station, WFCV, in 1989 or 1990 and he could not recall the last time he had visited the station. Tr. 1753. He spent approximately one month at the station when it was first acquired by Bott Broadcasting. He also spent about one month at KSIV, Clayton, Missouri when Bott Broadcasting acquired that station. He never maintained an office there and was considered general manager of the station only during the start up phase. Tr. 1755. He functioned as general manager of the Fort Wayne station for no more than 120 days. Tr. 1756-57.

87. Mr. Bott and his spouse have lived in the Kansas City, Missouri area for 28 years. Tr. 1719, 1784. It has been the base of operations for his various business interests and has held an attraction for him. He explained that it "is the city where our home has been located. . . . an area where I have taken a great deal of interest in the community as well as the service the radio station has rendered . . . ." Tr. 1726. Explaining why he would move to Bartlett, Mr. Bott said that it "is the type of community where it would personally be very enjoyable to interact in the total community in a way that has not been done in our corporate structure as it now is." Tr. 1807.

88. Mr. Bott has visited Bott Broadcasting's Mount Bullion, California station, KCIV, probably twice in 1990. Tr. 1760. Mr. Bott considers himself to be in semi-retirement and has since he was 30 years old. He states that he enjoys not being encumbered with the constraints of following a schedule and answering demands although he works more than 40 hours per week. Tr. 1772. He said his son will assume supervision of the various broadcast stations. Tr. 1772-73, 1776. That son, Richard Bott, has been serving as vice president and general manager of Bott Broadcasting. The stations' general managers report to him. Bott claims that his son will now take over his duties and leave him free and available to move to Bartlett. Tr. 1775-76. However, his son has received a grant for Blackfoot, Idaho where he has promised to move and become full-time general manager. It was on that basis that he was awarded the facility. *Richard P. Bott*, 3 FCC Rcd 7094, 7099 (ALJ 1988); *affirmed* 4 FCC Rcd 4924 (Rev. Bd. 1989), *review den.*, 5 FCC Rcd 2508 (1990). Mr. Bott now works at least 40 hours a week at Bott Broadcasting. Tr. 1724. He claims he was prevented from being a general manager elsewhere because he performed activities which his son was not previously ready to handle. Tr. 1775-76.

89. Mr. Bott does not have an office at Bott Broadcasting. Tr. 1720. He works at home where he has an office complete with company telephone lines and fax machine. He also spends time meeting with clients. Tr. 1722-24. Ordinarily, he does not go to Bott Broadcasting's offices. Tr. 1721. His secretary has her office there however. Tr. 1721, 1723.

90. In August 1986, one of Bott's companies received a construction permit for Goodland, Kansas. The original construction permit was extended three times. Tr. 1794-97.

Qualitative Proposal

91. Richard Bott represents that he will move to Bartlett. Bott Exh. 1. He lived in the same house in Independence, Missouri for at least twelve years. Tr. 1717. He would sell the house. Tr. 1718. Mr. Bott began in broadcasting in 1952 and he worked at stations on a day-to-day basis until the late 1970s. Bott Exh. 1, at 1-2.

Belz

Quantitative Proposal

92. Belz is a Tennessee corporation with one stockholder, Julianne P. Belz. Belz Exh. 1, at 1. She is also the president, treasurer and the only director. *Id.* Her spouse, Martin Belz, is vice president and corporate secretary. Ms. Belz proposes to work as the station's general manager, full time, 40 hours per week. Belz Exh. 1, at 1. She would supervise operation of the station. Belz Exh. 1, at 1.

Qualitative Proposal

93. Ms. Belz lives within the principal city contour of her proposed station. She lived there from 1977 to 1980, except summers, and since 1984, except for six months between July 1986 and February 1987. Belz Exh. 1, at 2. From 1984 to the present, she has been active in civic activities in Memphis. Belz Exh. 1, at 2-4.

Diversification of control of the media of mass communications.

94. Strong and its partners have no media interests. Strong Exh. 3, at 6; Strong Exh. 4, at 6. Bartlett Media and its partners have no media interests. Bartlett Media Exh. 1, at 1-2; Bartlett Media Exh. 2, at 12; Bartlett Media Exh. 3, at 6; and Bartlett Media Exh. 4, at 13. Bott's individual owner, Richard P. Bott, is president, director and joint owner with his spouse of 100% of Bott Broadcasting Company (BBC). He is also president and a director of Bott Communications, Inc. (BCI) and Bott Broadcasting Company/Tennessee, Inc. (BBT). BBC owns 80% of the stock of BCI and 100% of the stock of BBT. Sherley E. Bott serves as secretary/treasurer and director of BBC, BCI and BBT. Bott Exh. 1, at 2-3. BBC has a permit for daytime AM station KOCV, Overland Park, Kansas. Bott Exh. 1. Overland Park is 325 miles from Bartlett. BBC is the licensee of daytime AM station KQCV, Oklahoma City, Oklahoma. The station is 415 miles from Bartlett. BBC is the licensee of daytime AM station, WFCV, Fort Wayne, Indiana; it is located 460 miles from Bartlett. BCI is the licensee of daytime AM station KSIV, Clayton, Missouri, which is 220 miles from Bartlett. BCI was the permittee of FM station KKCI, Goodland, Kansas until June 22, 1990. Goodland is 690 miles from Bartlett. BCI is the permittee of a new FM station at Hastings, Nebraska which is about 565 miles from Bartlett. BBT is the licensee of WCRU, Collierville, Tennessee. Sherley E. Bott, BBC, and Richard P. Bott will end their interest in WCRV and its licensee. Bott Exh. 1, at 3-5 and Attachment A.

95. Belz and its stockholders have no media interests. Belz Exh. 1, at 5. Martin Belz, Julianne Belz's spouse, has an interest in KLAX-TV, Alexandria, Louisiana, which he has promised to divest. Belz Exh. 2, at 1.

Auxiliary Power

96. Strong (Strong Exh. 1, at 1), Bartlett Media (Bartlett Media Exh. 1, at 2), Bott (Bott Exh. 1, at 5 and Attachment B), and Belz (Belz Exh. 3, at 1) propose auxiliary power.

CONCLUSIONS

Bartlett Media Did Not Have Reasonable Assurance For The Funds It Needed To Construct And Operate When Robert C. Byrd Certified; The Testimony of Bartlett Media's Principals On This Issue Is Unreliable and Untrustworthy

97. Bartlett Media partner Robert C. Byrd, who owns a 40% equity interest, certified to the Commission that the applicant was financially qualified. He relied on a letter from the Bank of Bartlett, which purported to assure Bartlett Media that the Bank would provide $200,000 of the $235,000 that it estimated it needed to construct and operate. A loan of that size to Bartlett Media would have been prohibited by Tennessee state banking regulations because of the insider relationship of two Bartlett Media partners to the Bank. Because of that legal prohibition it appears that the letter issued by the Bank was simply an accommodation to Robert Byrd, the Chairman of the Board of Directors of the Bank.

98. The Bank of Bartlett is the only bank owned by the holding company West Tennessee Bancshares. Mr. Byrd is chairman of the board of both entities. He works full time at the Bank and derives a significant amount of income from his work for the Bank. Harold Byrd, Robert's brother, a 40% general partner in Bartlett Media, also works at the Bank full time and he and Robert share the same office at the Bank. Harold and Robert Byrd, three of their brothers, and four friends make up the board of the Bank and control 60% of the stock. Tennessee state banking regulations prohibit state banks, such as the Bank of Bartlett, from lending more than $100,000 to executive officers or to partnerships where executive officers hold a majority interest. Executive officers include officers who participate in major policy making functions of the bank. The chairman of the board, the president, every vice president and a number of other officers of state banks are presumptively executive officers unless specifically excluded from policy-making by the bank's by-laws and actual practice. Persons who have no official title, or if the title is assistant, and persons who may not receive a salary or compensation would be included in the insider prohibition if they have the authority to make policy. There is no dispute that Robert Byrd could not borrow more than $100,000 under these regulations. It is equally apparent that the prohibition applies to Harold Byrd and in turn Bartlett Media, a general partnership that Harold and Robert Byrd control with 80% of the equity.

99. Bartlett Media maintains that Harold Byrd is not an executive officer of the bank and that he does not make policy. Harold Byrd's most reliable testimony, which he gave before this issue arose, does not support Bartlett Media's claim. Once the issue was brought to the Commission's attention, Bartlett Media contradicted that testimony and maintained that Harold Byrd, although a bank director, stockholder, and director of marketing for the bank, is not involved in making policy for the Bank and is not an executive officer and could, therefore, borrow more than $100,000 for Bartlett Media's proposal.

100. Before Harold Byrd's role at the bank became an issue, he testified that he was an incorporator, director, and marketing person at the Bank. He stated that he was vice president of marketing. He also said he was vice president of the Bank and the Bank's holding company. At seven places in his testimony he either referred to himself as a vice president or agreed to the use of that term. He never corrected that testimony and had no explanation for referring to himself as a vice president when he later represented that he was not. He is the only person at the Bank responsible for marketing. Bartlett Media sought a second letter from the Bank on June 6, 1990 for a larger amount, $500,000. The "Credit Write-Up" for that loan, which was prepared under the direction of the Bank's chief executive officer, Bruce Smith, and initialed by seven members of the Bank's board, described Harold Byrd as "Vice President - Bank of Bartlett." Harold Byrd agreed that the person who typed the form would be aware of his functions at the bank. He said that when errors occur, they are corrected by Mr. Smith or the board. In the case of this credit report for the

board, Mr. Smith prepared it and no one sought to change it. Milton Rodgers, the third Bartlett Media partner and 20% equity holder, stated that he had heard people in the community refer to Harold Byrd as a vice president of the Bank.

101. By June 18, 1990, when the Bank letter had been called into question because of insider prohibitions, Harold Byrd said he was "mistaken" when he said he was a vice president in May 1990. While the record evidence overwhelmingly shows that that is unlikely, there is little question that Harold Byrd, as a major stockholder and marketing and business development director of the Bank, makes policy and is an insider even if he is not an officer. He and the Bank's chairman, Robert Byrd, share an office and discuss each other's work. They discuss policy questions. Harold Byrd sits on the loan committee of the bank, which includes the Bank's directors and the chief operating officer, Charles Tucker. The committee passes on loans and makes decisions about specific requests. The policies of the Bank are decided by its committees. Harold Byrd also serves on the personnel and marketing committees. Ted M. Hayden, a Memphis, Tennessee attorney who is experienced in local banking law reviewed Harold Byrd's description of his job and concluded that Mr. Byrd is an executive officer of the Bank because of the authority he exercises. He reached his conclusion based on Harold Byrd's own characterization of his role as being one that approves marketing options for the Bank and develops policy concerning the profile maintained by the Bank in the community. Mr. Hayden also thought it was important that Harold Byrd serves on the loan and special assets committees, which interpret and apply internal loan policies. Mr. Hayden noted that Harold Byrd testified that he "called the shots" on marketing and described himself as being "the marketing functions of the bank." Mr. Hayden also found significant Harold Byrd's explanation that he "act[s] independently" and that that has resulted in the Bank being successful. Harold Byrd's testimony shows that his role at the Bank brings him within Tennessee's prohibitions on banks lending to insiders.

102. It is unlikely that the Bank of Bartlett would violate the Tennessee banking regulations in order to provide money to Bartlett Media. Assuming that is the case, the letter from the Bank could only have been an accommodation to the Byrds. There is no question that the Bank did not treat the issuance of the loan letter to Bartlett Media in an arms-length manner. This is clearly demonstrated by the behavior of the Bank's chief executive officer, Bruce Smith, in issuing the loan letter. Mr. Smith, who prepared the December 14, 1987 loan letter, represented that it was addressed to the individual partners because he did not know the name of the partnership. That representation seems improbable. He could have found out simply by asking any of the partners since they executed the partnership agreement on the very day that Mr. Smith wrote the Bank's letter to them. Mr. Smith also could not remember whether he reviewed the financial statements of the borrowers. (It was his view that their financial statements did not really matter since the assets of the partnership would secure the loan.) Robert Byrd said that the Bank's board members were told about the loan in December 1987 and that the minutes of the loan committee would reflect that they had been told. He made that statement on May 22, 1990. The minutes of the loan committee do not reflect that they were informed. On June 7, 1990, he said that, in December 1987, he told the Bank's board, because the board acts as the loan committee for credit to directors and executives. But there is no reference to that in the board's minutes either. Robert Byrd then said that the minutes did not reflect the loan because it was not a binding commitment. Harold Byrd, who is a director, has no recollection of the Bartlett Media loan being mentioned to the board.

103. Bartlett Media has been unable to provide reliable testimony or substantiate who was going to receive the loan, the individual partners or the partnership. Because Mr. Smith stated that the assets of the partnership would be collateral for the loan, it appeared that the Bank would be lending the money to the partnership. On June 7, 1990, Robert Byrd represented to the Commission that that was the Bank's intention. But when the issue was raised about the legal ability of the Bank to lend to the partnership, Mr. Smith said the bank contemplated loans to the partners as individuals. He and Robert Byrd were then unable to provide a coherent explanation about what the bank contemplated or what the partners intended.

104. Mr. Smith said he knew all along about the bank law prohibitions on the loan and that he intended that the Bank would issue three loans to three individuals in the percentage of each partner's equity interest. That that was his intention is improbable. His testimony demonstrates that the Bank was in no position to make any judgment about whether such a transaction would satisfy state banking laws. He stated that at the time he wrote the letter he did not know what the partnership interests would be; he said that he did not even know that a partnership had been organized. Moreover, he did not prepare three letters for three individuals but instead he wrote one letter addressed to the three partners. Robert Byrd also testified that the loans would be according to equity shares. When he was asked how that could be reconciled with his representation that there was no partnership when he requested the loan, he said he was "pretty sure" he told Smith that there would be different portions of the loan to the Bartlett Media principals although he did not know whether there would be a partnership. He also said the loans need not be separate but could be joint and several, or loans to individuals, or a loan to a partnership.

105. Until the insider prohibitions on lending to the partnership were raised, Bartlett Media repeatedly represented in filings to the Commission that the loan was being made to Bartlett Media by the Bank. It never suggested that loans would be made to the individual partners. When the financial question was originally brought up, it was alleged that the December 14, 1987 bank letter was an accommodation but it was not claimed that it violated state banking law. To overcome that initial accusation, the Bank's board then unanimously approved a loan to Bartlett Media for a greater amount, $500,000. The new letter was described by Mr. Smith as a binding commitment for which each partner would be liable for the full amount. But then when the insider regulations were asserted, Smith said the Bank contemplated loans to individual partners as individuals and that the Bank did not intend to lend money to the partnership. Smith also said the June 6, 1990 $500,000 letter was addressed to the partnership for the Commission's benefit at the request of counsel but that the bank actually intended to lend to the individuals. Robert Byrd represented in different statements, that the board had always been aware that the loan would be to individuals, that the loan would be made to

the partnership, or that it might be both. When asked to reconcile his different testimony, he then said he could not recall whether he told the board that the loan would be to individuals as opposed to the partnership.

106. Robert Byrd also has claimed that the three partners had agreed from the outset that they would provide their personal funds for the station. He even stated that the partners had an agreement to provide the funds. There is no evidence to corroborate that claim and Milton J. Rodgers stated he had no intention of using his personal resources. Harold Byrd said that Bartlett Media relied on only the Bank's letter to finance its proposal when the application was submitted. There is no objective or corroborating evidence that establishes that Bartlett Media had decided where it would obtain the additional $35,000 over the Bank letter when it certified.

107. Bartlett Media has not been able to demonstrate that it had reasonable assurance of financing when it filed its application and certified. The evidence instead reflects that it obtained a letter from the Bank of Bartlett which was an accommodation to the partners. The evidence does not support Bartlett Media's claim that the Bank could or would provide the loan represented by the letter. Instead, the testimony on this issue is so inconsistent that it is unreliable. Bartlett Media has provided conflicting answers to questions about its financing and the Commission cannot rely on the various stories that have been told about what the Bank or the applicant intended. Overall, the partners' testimony is untrustworthy on this issue. Bartlett Media is not qualified to become a Commission licensee and it will not be compared to the other applicants in this proceeding.

Comparison of the Qualified Applicants

108. Three applicants, Strong, Bott and Belz are qualified and entitled to comparison of their proposals. Each of these applicants proposes that those principals exercising 100% control of the applicant will work at the Bartlett station full time, 40 hours per week. All of their pledges or promises cannot be credited, however, because there is "countervailing evidence" which "raises sufficient doubt" that not all of them have met their ultimate burden. *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2435-36 (Rev. Bd. 1990).

109. Strong is a general partnership with two partners, Raymond Strong and his spouse Jean-Marie Strong. They each propose to work full time at the station. Raymond Strong represents that he would be the general manager and Jean-Marie Strong states that she would be the office manager/public affairs director. Both Strongs have promised that their current business and family obligations will not interfere with their full-time operation of the station. The evidence of record does not establish that Raymond Strong perceives himself as having actually promised to manage the station on a day-to-day basis. Mr. Strong said he would average 40 hours per week. Some weeks he would work more and other weeks less. He said he would like to work less. Moreover, he said he would hire a station manager who would provide the actual skill needed to operate the station.

110. Currently, although Mr. Strong goes to his office each day to oversee a number of businesses, he does not work a 40 hour week, and has not since 1985. Originally, Mr. Strong said he spent 30 hours per week at his office. Since Mr. Strong intends to maintain his current business affairs, he was asked how he could do that and manage the station too. He then said he only works 5-10 hours per week. He explained that while he was at the office he spent the remaining time on such activities as collecting antiques, building signs for his subdivision and watching his children. Mr. Strong also owns a residential design firm in Venice, Florida and a home in Sarasota, Florida. He usually spends several months during the year at his Florida home. Mr. Strong appeared uninformed about what his promise entailed. Except for financing his proposal, he had little to do with its preparation or the determination of how the proposal would be made. While Mr. Strong concedes that he knows little about how to operate a station, that may not matter since it is doubtful on this record that he will be engaged in its operation.

111. Initially, Stanley Emert was counsel to Strong. He suggested that the Strongs organize a partnership and, when the Form 301 was completed, he told Mr. Strong to check the general partnership box. Mr. Emert prepared a partnership document in late 1987 and it was duly signed by the Strongs and became effective on December 16, 1987. Despite this legal document, Mr. Strong described his interest to the Commission when he filed the Form 301 as a "joint tenant with spouse." When integration statements were filed in April 1990, Strong had changed lawyers and Mr. Strong then represented that the applicant was two individuals who are "husband and wife." Contrary to the actual fact, he specifically represented in that statement that there was no written agreement incorporating their arrangements. When documents were requested, Strong found the partnership agreement that had been forgotten. The most logical explanation for their contrary representations is that neither one of the Strongs have paid much attention to their proposal. Mr. Strong said he could not remember discussing the agreement with Mr. Emert. Ms. Strong first said she had not discussed the agreement with Mr. Emert because she believed that if there were any questions Mr. Strong would have asked them. She later said she believed that she and Mr. Strong had talked with Mr. Emert about the partnership agreement. Their testimony demonstrates, moreover, that they know almost nothing about the agreement and have not taken any steps to implement it. Mr. Strong said that he and his spouse had individual authority to hire and fire while the partnership agreement provides that hiring and firing of an employee cannot ordinarily be done without the consent of the other partner. Raymond Strong stated that there was no reason why he could not receive a salary despite the fact that the agreement provides that partners cannot receive a salary. Ms. Strong's testimony and integration promise states that she will be the office manager while the partnership agreement provides that Ms. Strong will be the business manager with "concurrent charge of all financial details." The concurrent duties, they explained, means that Ms. Strong will supervise a bookkeeper if there is one, otherwise she will perform the job alone.

112. Raymond Strong's method for pursuing the application resulted in his knowing very little. An acquaintance, Charles Thompson, who owned a radio station, told him about the available channel. Mr. Strong never thought about owning a broadcast station before Mr. Thompson told him about the opportunity. He gave Mr. Thompson a fee and for that fee Thompson arranged for legal and engineering services and filing fees. Mr. Strong has no idea how much the individual services cost. About all he did was arrange to use his mother's land for the

antenna site and provide for financing. Other information has been provided to Strong by Robert Blow who is, like Thompson, a broadcaster and consultant. Mr. Blow has also involved Mr. Strong in a broadcast application for Jackson, Tennessee. Mr. Strong's testimony demonstrates that he knows nothing at all about the Jackson proposal except that he is a 37.5% partner. With this background, it is hard to believe that Mr. Strong will work at the station on a day-to-day basis and that he will develop and implement policies and play an important role in management. The greater likelihood is that someone more experienced will be hired to perform those functions. Because Mr. Strong is uncertain of the amount of time and the role he will play at the station, there is no factual predicate for establishing how much integration credit he should receive. *Progressive Communications, Inc.*, 5 FCC Rcd 7058, 7059 (1990).

113. Ms. Strong's proposal to act as office manager/public affairs director raises doubts about whether she will play an important role in management and have responsibilities that will involve policy functions. In important respects, Ms. Strong's role was assigned to her by counsel and defined by counsel. She simply took his advice. Ms. Strong did not have any understanding of why her duties were defined one way in one document and another way in other documents. In the integration statement Strong represented that Ms. Strong alone would oversee budget development but in the written testimony that function was assigned to both Strongs. She said she could only guess at the reason for the change. She explained that the difference in the description of her duties in the integration statement as financial "record keeping" and in her written testimony as overseeing financial affairs was the decision of her counsel. She also could not explain why she said in the integration statement that she would approve purchases but no mention was made of that role in her written testimony.

114. While Ms. Strong in the past has worked at Mr. Strong's company, Pressed Steel, as a bookkeeper, she represented that at the station she would supervise a bookkeeper. Mr. Strong explained that Ms. Strong would supervise a bookkeeper when the time came that they could have a bookkeeper but in the meantime Ms. Strong would be the bookkeeper and do the same job she did at Pressed Steel. In the December 1987 partnership agreement, Ms. Strong was listed as the business manager and it was represented that she would have concurrent charge of financial details. Mr. Strong said that meant she would supervise the bookkeeper.

115. Ms. Strong's duties were expanded by counsel who said she would be public affairs director; he also told her what her duties would be. Ms. Strong envisions this position involving her with the community such as attending community events. She would report to the station manager or general manager in this job. The only part Ms. Strong played in preparing the proposal was to listen in on conversations. The record does not reflect that she made any suggestions or acted independently in any manner. She has not made a credible showing that she will effectuate and decide policy and manage the station. Her role, according to her spouse, will be that of bookkeeper and insofar as she makes other claims, those were applied like a postage stamp to her testimony by counsel. She has no idea what the jobs assigned will entail; it is hard to believe that someone who has had her jobs assigned by counsel and has been impassive to the proposal will suddenly become an active manager who formulates policy. Strong is not entitled to 100% integration credit. *Progressive Communications, Inc.*, 5 FCC Rcd 7058 (1990).

116. Richard P. Bott is an individual applicant. He has controlling interests in seven broadcast stations and these interests make his promise to integrate comparatively less important than that made by Strong and Belz. Mr. Bott, who promises to manage the Bartlett facility on a full-time, 40 hour per week, basis recently made a similar promise for Overland Park, Kansas. After he settled with the other applicants for Overland Park and was awarded a permit, he said he and his spouse changed their minds about working at the station. Moreover, while Mr. Bott has frequently managed the stations he owned, his day-to-day participation has been only during the initial operation of the stations. In addition, it appears unlikely that Mr. Bott's son, Richard, will oversee the other stations as Mr. Bott represented since he is committed to manage a new station in Blackfoot, Idaho, far from the Kansas City headquarters of the Bott stations. Furthermore, Mr. Bott has spent many years personally overseeing his stations and it is not credible that he will now leave them to be directed by someone else.

117. Bott Broadcasting was granted a construction permit for Overland Park, Kansas on January 6, 1986. *Joanna Glinter*, FCC 86M-074, released January 8, 1986. Mr. Bott promised he would manage the station on a full-time basis. His spouse also promised to manage. Mr. Bott states that his "lifestyle" changed after the grant was made. But after examination of his reasons in this proceeding, it is apparent that Mr. Bott simply changed his mind after the grant. Although Mr. Bott did not tell the Commission immediately about his change of plans, he testified that he did notify the Commission before the grant. Actually, he waited nearly a year and a half after the construction permit was granted. The station still has no manager and there is nothing to prevent Mr. Bott from managing the station now if he has again had a change in lifestyle and wants to manage a station. When he was asked about that possibility, he said he did not want to manage just any station but he wanted to move to the sunbelt area where Bartlett, Tennessee is located. That reasoning is also dubious since Bott already owns a station at Collierville, Tennessee which is also in the Memphis market. (He has promised to divest that interest.) Recently Mr. Bott sought and received a grant for FM station KKCI, Goodland, Kansas. After the grant was made, he extended the permit three times, and then he changed his mind about operating the station; the permit has now been transferred.

118. If past history is any guide, Mr. Bott may manage the Bartlett station for a few months and then return to his home in the Kansas City area where he has lived for 28 years. It is from his home in Independence, Missouri that he oversees his interests; he seldom even visits the stations. Mr. Bott sought to allay any concern about his longtime work habits by pointing out that his son, Richard, was now ready to take over for him. What Mr. Bott failed to point out is that his son has promised the Commission that he will move to Blackfoot, Idaho to manage a new FM station. If past history is any guidance, it is improbable that Mr. Bott will leave Kansas City for Bartlett, Tennessee to manage this channel. Bott's promise to manage the Bartlett facility is not entitled to credit.

119. Belz promises that Julianne Belz, its only stockholder, would manage the station on a full-time basis as the general manager. The opposing parties have alleged

that Ms. Belz will not manage the station or that if she does, she will share the management duties with her spouse, Martin Belz. There is no reliable evidence to support their contentions that Ms. Belz will not manage the station or that her spouse will. Thus far Ms. Belz has been an active owner; she made the decision to apply and she alone prosecuted the application. Ms. Belz learned about the availability of the frequency from *Broadcasting Magazine*. Tr. 1957-58. She initiated the application, selected and hired legal and engineering assistance, and, with counsel, prepared a preliminary budget. Tr. 1457-58, 1460, 1491-93, 1542-43. She secured a transmitter site, decided to form a corporation, hired counsel to prepare the corporate documents, and approved them when they were completed. Tr. 1382-84, 1462-63, 1464-67, 1468. She drafted and reviewed the application, supervised its prosecution, selected a bank for the applicant, arranged for public notice, and paid for prosecution of the application with her own personal funds. Tr. 1491, 1493.[1]

120. There is no evidence that Martin Belz participated in the business of the applicant. He has provided no funds for prosecution and he does not intend to do so. Tr. 1366-69, 1450-51. And he has stated that he will have no involvement in the day-to-day operations of the station when the Belz application is granted. Belz Exh. 1, at 2; Tr. 1396, 1518-23. He currently works 80-100 hours a week as chief operating officer of Belz Enterprises, a company whose primary business is real estate development. Tr. 1354-56. While Mr. Belz has a one-third ownership interest in KLAX-TV, Alexandria, Louisiana, he has pledged to divest that interest. Tr. 1363-64. Mr. Belz explained that he views his interest in KLAX-TV as an investment and that he has no role in the day-to-day operation of the station. Tr. 1360, 1375, 1414. Mr. Belz, of course, has no ownership interest in Belz Broadcasting, while he does in KLAX. He has repeatedly said that he will have no role in the day-to-day affairs of the station. *See* Tr. 1396-97, 1414, 1518-23.

121. The opposing parties have urged that it is unlikely that Ms. Belz will actually operate the station because she has not been employed since she married in 1986. Belz points out that Ms. Belz married in June 1986, that from July 1986 to February 1987 she helped her spouse manage the construction of the Peabody Hotel in Orlando, Florida, and that within a few months of returning home to Memphis she made application for the Bartlett facility. Belz Exh. 1, at 2; Tr. 1438-39. Belz responds that Ms. Belz during her adult life has been either a student, employed, or pursuing this application.

122. The opposing parties have also suggested that Mr. Belz has a more important role in the applicant than Belz has admitted. Mr. Belz is secretary and vice president of the applicant. Belz Exh. 2, at 1. He was a director for a few days before the application was filed in December 1987, but he was removed from that position. Tr. 1387, 1473-75, 1495. He was incorrectly referred to as a director in an amendment. Mr. Belz has not performed any duties as vice president and as secretary he signed the initial incorporation documents and minutes and attended the first meeting of the shareholders and directors. Tr. 1385-87, 1398, 1412-14, 1511. There is no evidence that he prosecuted the application.

123. Belz is entitled to full credit for Ms. Belz's promise to manage the Bartlett facility on a full-time basis. Neither Strong nor Bott have established that their full-time proposals are credible. Bott, moreover, has an interest in seven existing stations. Therefore, on the most important comparative factor of diversification of the ownership of mass media, Belz and Strong, who have no mass media interest, are to be preferred over Bott who has multiple interests. All of the parties propose an auxiliary power system in the event the station's power is interrupted; they are equal on that factor.

124. Bartlett Media is unqualified because its representations about its financial proposal are unreliable and dishonest. On a comparative basis, of the three qualified applicants, Belz is to be preferred for presenting the most credible proposal for full-time integration of ownership into management.

ACCORDINGLY, IT IS ORDERED that the joint motion for extension of time, filed August 28, 1990 by Richard P. Bott, Raymond J. & Jean-Marie Strong; and Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media IS GRANTED.

IT IS FURTHER ORDERED that the motion to file one day late, filed September 21, 1990 by Richard P. Bott IS GRANTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed October 26, 1990 by Belz Broadcasting Company IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of Raymond J. Strong & Jean-Marie Strong (File No. BPH-871223MQ), Robert C. Byrd, Milton J. Rodgers & Harold W. Byrd, A General Partnership d/b/a Bartlett Media (File No. BPH-871224MC), Richard P. Bott (File No. BPH-871224ME) ARE DENIED and the application of Belz Broadcasting Co. (File No. BPH-871223MI) for a construction permit for a new commercial FM station on Channel 225A in Bartlett, Tennessee IS GRANTED provided Martin Belz divests his interest in and connection with KLAX-TV, Alexandria, Louisiana.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Strong incorrectly claims that Ms. Belz never paid for her stock (*see* Tr. 1467), that Mr. Wood arranged for the engineer (*see* Tr. 1460), that Ms. Belz had an incorrect understanding of Tennessee law (*see* Tr. 1453), that Ms. Belz could not explain why she selected her spouse as secretary (*see* Tr. 1453), and that Ms. Belz "used people from her husband's company to select a site for her" (*see* Tr. 1382-84). Strong also urges that Ms. Belz did not independently select legal counsel. The record reflects that she did. *See* Tr. 1458, 1442-43, 1384, 1412, 1464-65. Contrary to Strong's claim Ms. Belz did not select her accountant because he was her spouse's, she instead chose him because he had been her personal accountant. Tr. 1472-73. Strong also claims that Ms. Belz currently only takes care of her child but the record reflects that Ms. Belz has a housekeeper who helps with childcare two or three days a week. Tr. 1490.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON COMMUNICATIONS CORPORATION	**MM Docket No. 83-976** File No. BPH-811102AH
FIRST CLASS COMMUNICATIONS, LTD.	**MM Docket No. 83-982** File No. BPH-820624AX
HEATHER H. STENGEL	**MM Docket No. 83-983** File No. BPH-820624AZ

For a Construction Permit
for a New FM Station in
Chatham, Massachusetts

ORDER

Adopted: January 17, 1991; Released: January 31, 1991

By the Commission:

1. Before the Commission for consideration is a Review Board decision, *Cannon Communications Corporation*, 5 FCC Rcd 2695 (Rev. Bd. 1990), supplementing a previous decision that granted the application of First Class Communications, Ltd. for a new FM station in Chatham, Massachusetts, and denied the mutually exclusive application of Cannon Communications Corporation. *See Cannon Communications Corporation*, 4 FCC Rcd 7514 (S.I.D. 1989).[1] We agree with the Board's resolution of this case. We wish, however, to comment on certain matters. Also, we herein deny Cannon's petition to reopen the record and enlarge issues against First Class Communications, Ltd.

I. APPLICATIONS FOR REVIEW

2. The Review Board, affirming a supplemental initial decision by Administrative Law Judge Joseph Stirmer, rejected allegations that Cannon's principal Lynn Landy abused the Commission's processes by approaching First Class' owner Joseph A. Ryan and threatening to file a derogatory affidavit concerning Ryan[2] with the Commission unless Ryan agreed to Landy's settlement terms.[3] *Cannon Communications Corporation*, 4 FCC Rcd 7514 (S.I.D. 1989), *aff'd*, 5 FCC Rcd 2695 (Rev. Bd. 1990). The Board found that although Landy had approached Ryan, the record evidence did not establish that she had threatened him.[4] In finding that Landy did not abuse the Commission's processes, the Board relied on the decision in *Country-Politan Broadcasting, Inc.*, 60 FCC 2d 361 (Rev. Bd. 1976), *rev. denied*, 68 FCC 2d 640 (1978), in which the Board similarly found that inconclusive, self-serving testimony did not establish the existence of a threat.

3. In urging that Landy did abuse the Commission's processes, Ryan attempts to distinguish the *Country-Politan* case on two grounds. We find Ryan's attempts to distinguish *Country-Politan* unpersuasive. First, it is not significant that Ryan testified that, although Landy did not explicitly threaten him, he inferred a threat from the substance of the conversation and her tone, a circumstance not present in *Country-Politan*. The ALJ found no implied threat based on Landy's testimony concerning the meeting. The record supports the ALJ's finding that Ryan's inference was mistaken, 4 FCC Rcd at 7529 ¶ 94, and thus this case does not differ from *Country-Politan* in that respect. Second, Ryan argues that Cannon's actions are more egregious because, unlike the situation in *Country-Politan*, where a party was confronted with legitimate allegations, the ALJ ultimately found that the Callahan affidavit was not credible. *Id.* at 7527-28 ¶¶ 84-88, 7529 ¶ 94. However, it is immaterial that the Callahan affidavit was eventually discredited. Abuse of process occurs when a threat is made to divulge or withhold information in order to coerce settlement. *See Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 513 ¶ 26 (Rev. Bd. 1980), *recon. denied*, 88 FCC 2d 1033 (Rev. Bd. 1981), *rev. denied*, FCC 82-168 (Apr. 16, 1982). An abuse of process inquiry focuses on whether the information has been used as part of a threat, and not on the substance of the information. *Id.* at 513 ¶ 27. In light of the fact that the record supports a finding that no threat was made, the validity of Callahan's affidavit is of no moment. Accordingly, the Board correctly held that this case resembles *Country-Politan*. Moreover, in finding no abuse of process, the Board properly deferred to the ALJ's credibility findings, crediting Landy's testimony that she intended no threat, which is supported by contemporaneous notes made by Landy's attorney shortly after the meeting with Ryan.

4. In addition to resolving the abuse of process issue, the Board's decision also dismissed Ryan's motion to dismiss Cannon's application. The Board found no *prima facie* merit in Ryan's contention that Cannon's application should be dismissed because Cannon failed to amend its application in a timely manner and failed to comply with a related order by the ALJ, but merely dismissed the motion as moot in view of the Board's disposition of the exceptions to the supplemental initial decision which affirmed the grant of Ryan's application. 5 FCC Rcd at 2704 n.1. Cannon failed to amend its application in a timely manner to report additional broadcast interests acquired by Landy's husband. The ALJ accepted the untimely amendment, which was filed after the case had been remanded for a supplemental hearing, but required Cannon to supplement the amendment by reporting the dates on which the interests were acquired. Cannon did not comply with the ALJ's order during the course of the supplemental hearing. Ryan filed his motion to dismiss Cannon's application with the Board, after the ALJ had issued his decision in the supplemental hearing. Cannon supplied the required information with its opposition to Ryan's motion to dismiss.

5. We agree with the Board that Cannon's failure to amend its application in a timely manner to report additional broadcast interests and to comply with the ALJ's order, which Cannon claims was inadvertent, does not amount to the kind of egregious, disruptive, or prejudicial conduct for which the sanction of dismissal is appropriate. *See Comuni-Centre Broadcasting, Inc. v. FCC*, 856

F.2d 1551, 1554 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 1539 (1990); *Mark A. Perry*, 4 FCC Rcd 6500, 6502 ¶ 15 (Rev. Bd. 1989). Moreover, Cannon's noncompliance with the ALJ's order produced no undue administrative burden or prejudice to Ryan, as exemplified by the fact that Ryan did not even raise this matter before the ALJ. The Board correctly found no merit in Ryan's motion; therefore, its dismissal of the motion is harmless error because Cannon cannot prevail over Ryan in any event, since (as indicated in the following paragraphs) we also find no merit in Cannon's request to reopen the record to examine Ryan's financial qualifications.[5]

II. PETITION TO REOPEN THE RECORD

6. Cannon seeks to reopen the record and to enlarge issues against Ryan, alleging that Ryan is financially unqualified and that Ryan lacked candor before the Commission. These allegations are based on Ryan's recent petition for protection from creditors under Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 101 *et seq.* (1976).[6] Cannon argues that the bankruptcy petition discloses that Ryan is insolvent and therefore lacks the financial qualifications to be a Commission licensee. Cannon also asserts that Ryan failed to timely report that a federal tax lien was filed against Ryan on April 5, 1990. According to Cannon, the filing of the tax lien, coupled with the magnitude of Ryan's debts, suggests that Ryan became insolvent well before filing for bankruptcy and that Ryan attempted to conceal his financial condition to avoid Commission scrutiny.

7. Ryan opposes Cannon's petition on both procedural and substantive grounds. Procedurally, Ryan asserts that the petition is untimely because Cannon's petition was filed more than fifteen days after Cannon discovered the fact of Ryan's bankruptcy, whether measured by the date that Ryan's counsel first informed Cannon by letter of the filing of the bankruptcy petition or by the date of Ryan's amendment reporting the bankruptcy filing. Ryan also asserts that the automatic stay provisions of the Bankruptcy Act prohibit further Commission proceedings based on his financial qualifications.[7] As to the merits of Cannon's petition, Ryan argues that there is no basis for reopening the record, because Ryan complied with the Commission's financial standard by constructing and operating the station in Chatham for the past three and one-half years pursuant to program test authority.[8] Ryan contends that there was no duty to report changes in Ryan's financial condition prior to filing for reorganization under Chapter 11. Cannon, in its reply, reasserts its contention that the requested issues are warranted since Ryan's construction and operation of the station at its own risk does not obviate inquiry into Ryan's financial qualifications and candor.

8. We agree with Ryan that the filing of a petition in bankruptcy after constructing and operating the station for more than three years does not raise a substantial and material question of fact as to Ryan's financial qualifications.[9] Further, Cannon's allegations raise no candor or reporting issues for which the record must be reopened.[10] The financial qualifications of an applicant are evaluated on the basis of its ability to construct and operate the station for three months without revenue. *See Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3858 ¶ 39 (1989). Here, the record indicates that Ryan in fact constructed the Chatham facility and operated it for three years, far longer than the time period relevant to the Commission's financial qualifications standard. The Commission recognizes that being financially qualified initially is no guarantee of ultimate financial success. Thus, there is no basis to conclude in view of the facts of this case that Ryan is not financially qualified under the applicable standard by virtue of his bankruptcy filing. *See Dorothy J. Owens*, 5 FCC Rcd _____, ¶ 14 (1990).[11]

9. Further, Cannon has not raised a substantial and material question of fact with respect to Ryan's candor or compliance with the reporting requirements of 47 C.F.R. § 1.65. As indicated in the preceding paragraph, Cannon has provided no basis to conclude that Ryan's present financial difficulties are relevant to the Commission's financial qualifications standard. Thus, there is no basis to conclude that Ryan had a duty to report these financial difficulties, or the tax lien, prior to filing the bankruptcy petition.[12]

III. ORDERS

10. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g), the Applications for Review filed May 29, 1990 by Cannon Communications Corporation and First Class Communications, Ltd. ARE DENIED.

11. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge Issues filed November 19, 1990 by Cannon Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: Applications for Review filed on May 19, 1990 by Cannon Communications Corporation and First Class Communications, Ltd.; an Opposition filed on June 15, 1990 by Cannon; "Comments" filed on June 15, 1990 by First Class Communications; Petition to Reopen the Record and Enlarge Issues Against First Class Communications, Limited, Debtor-In Possession filed November 19, 1990 by Cannon; an Opposition to Petition to Reopen The Record filed December 4, 1990 by First Class; and a Reply to the Opposition filed on December 14, 1990 by Cannon. Cannon and First Class were granted an extension of time, until June 15, 1990, to respond to the applications for review. *See Order*, FCC 90I-62 (Jun. 15, 1990).

[2] The affidavit of Steven Callahan, Ryan's former employee, charged Ryan with making misrepresentations to the Commission.

[3] First Class Communications, Ltd., the current applicant, is a corporation wholly owned by Ryan, to which the construction permit was subsequently assigned. For simplicity, both that corporation and Ryan will henceforth be referred to as Ryan.

[4] The Board found that the conflicting testimony of Ryan and Landy was inconclusive as to whether a threat was made, and thus declined to overturn the ALJ's credibility findings, crediting Landy's testimony that she intended no threat. The cir-

cumstantial factors cited by the Board, namely, Landy's prompt filing of the Callahan affidavit with the Commission and the absence of further approaches to Ryan by Landy, tend to corroborate the Board's finding. However, Landy's subsequent filing of the Callahan affidavit has less weight than it would otherwise, given the fact that Ryan had already filed an affidavit setting forth his version of what had transpired at their meeting.

[5] Cannon has indicated its intention to resume its appeal of the Commission's comparative decision, granting Ryan's application, in the United States Court of Appeals for the D.C. Circuit. *See Cannon Communications Corporation*, 101 FCC 2d 169 (Rev. Bd. 1985), *rev. denied*, FCC 86-244 (May 15, 1986). That decision, not at issue here, assessed a slight diversification demerit against Cannon based on media interests of the husband of Cannon's principal. We therefore wish to note additional media interests reported by Cannon subsequent to the Commission's comparative decision which are relevant to Cannon's appeal: a CATV system in Stowe, Vermont acquired in August, 1984; WDST(FM), Woodstock, New York acquired in July, 1987; a CATV system in Jeffersonville, Vermont acquired in June, 1988; and a 49% interest in WZAD(FM), Wurtsboro, New York acquired in November, 1988.

[6] Ryan filed an amendment to his application on October 22, 1990, reporting the bankruptcy petition. The amendment was accepted by *Order*, FCC 90I-118 (Nov. 8, 1990).

[7] Ryan cites 11 U.S.C. § 362(a)(1), which provides that, absent a specific exception under 11 U.S.C. § 362(b), upon the filing of a bankruptcy petition, no actions, including administrative actions, against the debtor may be commenced, and that pending actions are automatically stayed.

[8] Ryan constructed the Chatham facility even though grant of his application was not yet final due to the pending appeal of the Commission's comparative decision in the Court of Appeals. Ryan pursued this construction at his own risk, and such construction before resolution of all other outstanding issues presently under appeal in this proceeding creates no equities in Ryan's favor as to the outcome of the appeal.

[9] We need not determine whether Cannon's petition to reopen was timely filed because we are denying the petition on the merits. Further, we need not reach Ryan's contention that the automatic stay provisions of Chapter 11 of the Bankruptcy Act, 11 U.S.C. § 362(a), prohibit the Commission from considering Cannon's petition.

[10] In this regard, we note that Ryan is now operating the Chatham station as a debtor-in-possession, consistent with Ryan's attempt to reorganize under the Bankruptcy Act. Consequently, it does not appear that there has been a change in core circumstances with respect to Ryan's application, the grant of which has not yet become final. *See Greater Boston Television corporation v. FCC*, 463 F.2d 268, 283-86 (D.C. Cir. 1971).

[11] *Tri-State Communications*, 5 FCC Rcd 6232 (1990), which Cannon cites in support of the proposition that applicants subject to bankruptcy proceedings are not excused from meeting the financial qualifications requirements, is not applicable here. In *Tri-State*, the Commission declined to permit a bankrupt, financially disqualified applicant to amend its financial showing in order to substitute a financially qualified applicant. The applicant involved was neither a licensee nor a permittee and thus its financial qualifications were still in issue. By contrast, Ryan's financial qualifications were not at issue during the comparative proceeding, and Ryan has since constructed and operated for longer than three months.

[12] *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861 (Rev. Bd. 1986) and *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986), cited by Cannon, do not require a different result. The Review Board found that applicants in these proceedings failed to disclose changes in their financial conditions, including the imposition of a tax lien against the applicant in *Las Americas*, that occurred *during the comparative proceedings* which affected or may have affected the applicants' financial qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-470

In re Applications of

F.E.M. RAY, INC. File No. BPH-870515NL

PLAYA DEL SOL BROADCASTERS File No. BPH-870515NX

For Construction Permit for a
New FM Station on Channel 281A
Tucson, Arizona

Appearances

David Tillotson on behalf of F.E.M. Ray, Inc. and *Richard Rodin, Marissa G. Repp*, and *David W. Karp* on behalf of Playa Del Sol Broadcasters.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: January 24, 1991; Released: January 31, 1991

1. The two remaining applicants and eight other applicants were designated for hearing on October 13, 1989. *NJT Limited Partnership*, 4 FCC Rcd 7969 (1989). The following issues remain to be decided:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence on these issues, which of the applications, if any, should be granted.

2. A prehearing conference was held on January 16, 1990. *Order*, FCC 90M-112, released January 19, 1990. The written testimony was examined at hearing sessions held from June 18, 1990 through June 21, 1990. The record was closed on June 21, 1990. *Order*, FCC 90M-1794, released June 25, 1990. Proposed findings and conclusions were filed by the parties on July 20, 1990 and replies were filed on August 8, 1990.

FINDINGS

Comparison of the Applicants

Full-time participation in station operation by owners

FEM Ray

3. FEM Ray is an Arizona corporation with two classes of common stock, Class A and Class B. FEM Ray Exh. 1. Class A shareholders are entitled to one vote per share on matters submitted to vote of the shareholders and Class B shareholders are entitled to vote on proposals for the sale of all or substantially all of the corporation's assets or for a merger. *Id.* FEM Ray has three voting stockholders who are also officers and directors. *Id.* They each propose to work full time, 40 hours per week, at the Tucson facility. Francine Rienstra owns one-third of the voting shares, is president and a director, and proposes to work full time, 40 hours per week, as general manager. FEM Ray Exh. 3. She will oversee the performance and operation of the station and her duties will include arranging for the construction of the station, hiring, firing, and supervising the sales staff, establishing and maintaining community ties, designing promotions and overseeing the efficiency of the station.

4. Constanza Rodriguez also owns one-third of the voting shares, is secretary/treasurer and director, and proposes to work full time, 40 hours per week, as the station's business manager. FEM Ray Exh. 2. She will direct the business and accounting operation of the station. *Id.* She will prepare income and expense projections, maintain operating budgets, and operating expense accounts, manage receivables and payables, collect delinquent accounts, hire office personnel, develop financial policies, and prepare reports involving the business and accounting operations. *Id.*

5. Mary Beal owns the remaining one-third of the voting shares of FEM Ray, is vice president and a director, and proposes to work full time, 40 hours per week, as the station manager. FEM Ray Exh. 4. She will direct the daily programming and production operations of the station. *Id.* Her duties will include hiring, supervising, and firing production and on-the-air personnel, and other related duties. FEM Ray Exh. 4.

6. Ms. Rienstra is a resident of Tucson. FEM Ray Exh. 3. She has lived there since 1980 and previous to 1980, from 1956 to 1968. *Id.* Ms. Rienstra has been an active participant in Project Graduation since 1986, American Women in Radio and Television since 1987 and her Tucson church since 1982. *Id.* She has been employed at Tucson broadcast stations beginning in 1981 and as a manager from June 1987 to April 1988. *Id.* Ms. Rienstra is female. *Id.*

7. Constanza Rodriguez has lived in Tucson since 1974. FEM Ray Exh. 2. Ms. Rodriguez has been an active member of the Columbian Club of Tucson since 1985, volunteered at the El Pueblo Clinic since 1981, and since 1988 volunteered as an instructor at the Manzo Elementary School. *Id.* Ms. Rodriguez is Hispanic and female.

8. Mary Beal lived in Tucson from 1973 to January 1, 1987. FEM Ray Exh. 4. She will move to Tucson if FEM Ray's application is granted. *Id.* From 1984 to 1985, Ms. Beal was active in the 3 HO Drug and Alcohol Treatment Facility in Tucson. From 1983 to 1984, she was active in Young Arizonans Charting a Healthy Tomorrow; from

1979 to 1984, she was active in the Arizona Theater Company; and from 1975 to 1984 she was on the board of the Fan Kane Research Center for Brain-Injured Children. *Id.* Ms. Beal, from 1983 to 1984, was President of Arizona Fitness Tennis Lincoln Mercury Women's Tennis Classic which benefited charities. *Id.* During the period 1984 to 1985, Ms. Beal was active in the Tucson Tennis classic which raised money for charity. *Id.* Since 1986, she has worked in management at two radio stations. *Id.* Ms. Beal is a woman.

Playa Del Sol

9. Edward R. Stolz is the only principal in Playa Del Sol. Playa Del Sol Exh. 1. He does not propose any integration. Playa Del Sol Exh. 2.

Diversification of the media of mass communications

10. FEM Ray and its officers and directors have no mass media interests. FEM Ray Exh. 1. Playa Del Sol's principal Edward R. Stolz owns Royce International Broadcasting Company which is the licensee of KWOD-FM, Sacramento, California and the permittee of KRCK(AM) Burbank, California. Playa Del Sol Exh. 1. KWOD is a 50 kilowatt station and KRCK is 50 kW daytime and 14 kW nighttime AM station which serves the Los Angeles metropolitan area.

Auxiliary power

11. Both FEM Ray and Playa Del Sol propose emergency power generators at the studio and transmitter site. FEM Ray Exh. 1 and Playa Del Sol Exh. 4.

CONCLUSIONS

Comparison of Playa Del Sol and FEM Ray

12. FEM Ray proposes full-time integration into management by each of its voting stockholders. Playa Del Sol does not propose that Edward Stolz, the sole principal of the applicant, will work at the station. In addition, Mr. Stolz owns two radio stations already. FEM Ray is to be preferred comparatively because it has no media interests and Playa Del Sol's principal does and because it proposes integration and Playa Del Sol does not. Both applicants propose auxiliary power and are equal on that criterion. There is no question that FEM Ray is superior to Playa Del Sol on quantitative integration of owners into management and diversification of the mass media.

ACCORDINGLY, IT IS ORDERED that the application of Playa Del Sol Broadcasters (File No. BPH-870515NX) IS DENIED and the application of F.E.M. Ray, Inc. (File No. BPH-870515NL) for a construction permit for a new FM station on Channel 281A at Tucson, Arizona IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC.
Bay Shore, New York

File No. BPH-850712GV

et al.

For a Constuction Permit for a
New FM Station on Channel 276

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1991; Released: February 1, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. By *Memorandum Opinion and Order*, FCC 90M-3570, released November 8, 1990, Administrative Law Judge Richard L. Sippel terminated this proceeding by approving a comprehensive settlement agreement among the applicants. One of the applicants who agreed to dismiss its application -- Bay Shore Broadcasting Corporation (BSBC) -- now seeks to resurrect the proceeding by way of a December 10, 1990 "Petition for Reconsideration" directed to the Commission (and informally referred to the Board). This pleading generated a motion to strike, filed on December 14, 1990 by Shore Media, Inc. (Shore Media), the surviving entity pursuant to the settlement agreement, which provided for a merger among three applicants: Bay Shore Community Broadcasting Associates, Ltd. (Community), Barbara J. Hughley and Betty D. Fox d/b/a Fire Island Broadcasting (Fire Island), and Susan Lundborg (Lundborg). On December 26, 1990, BSBC filed an opposition to Shore Media's motion to strike. In sum, BSBC complains that it learned on November 30, 1990 that Shore Media has violated a provision of the settlement agreement regarding guarantees by the three merged applicants that BSBC will receive its promised $100,000.

2. BSBC's "Petition for Reconsideration" will be dismissed as procedurally defective for the following reasons. First, BSBC improperly invokes Section 1.106 of the Commission's Rules because, as we clearly explained in *Carroll, Carroll & Rowland*, 4 FCC Rcd 7149, 7150 (Rev. Bd. 1989), *rev. denied*, 5 FCC 2d 2430 (1990), an ALJ's final ruling is not subject to that rule's provisions governing reconsideration. Instead, BSBC's procedural remedy lies in Section 1.302 of the Rules, which governs appeals from final rulings of an ALJ. Second, even treating the instant incorrectly-styled and misdirected pleading as an appeal, BSBC is inexcusably tardy in its requested relief. Section 1.302 requires an aggrieved party to file a notice of appeal within 10 days of the release of the ALJ's ruling, and the appeal itself within 30 days of the release of the ruling. BSBC has missed both deadlines. Nor does good cause exist for waiving the 10-day deadline *Cf. Shirley Marchant*, 4 FCC Rcd 5241 (1989) (10-day deadline can be waived for good cause but 30-day deadline is firm). Finally, BSBC's complaint appears to be limited to a disagreement over the meaning of a contract provision -- a private dispute routinely left to a legal forum other than the Commission. *See Burwood Broadcasting of Memphis, Ltd.*, 4 FCC Rcd 827 (Rev. Bd. 1989); *see also Mc Alister Television Enterprises, Inc.*, 60 RR 2d 1379 (1986).

3. ACCORDINGLY, IT IS ORDERED, That Bay Shore Broadcasting Corporation's petition for reconsideration filed December 10, 1990 IS DISMISSED, and that Shore Media, Inc.'s motion to strike IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-376

In re Applications of

GAYLA JOY HENDREN File No. BPH-880701MT

KERM, INC. File No. BPH-880712MJ

For Construction Permit for a
New FM Station on Channel 293C2
Bella Vista, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1991; Released: February 1, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. The Review Board has before it: (a) the "Contingent Appeal," filed on November 16, 1990 by JEM Broadcasting Company, Inc. (JEM); (b) a motion to dismiss the contingent appeal, filed on December 3, 1990, by Gayla Joy Hendren (Hendren); (c) JEM's motion for leave to file a supplement, and the supplement, filed on December 14, 1990, and (d) Hendren's motion to strike the supplement, filed on December 18, 1990. These pleadings concern a series of procedural missteps, the salient facts of which are as follows.

2. By *Hearing Designation Order*, 5 FCC Rcd 5440 (1990) (*HDO*), the Mass Media Bureau designated the applications of Hendren and KERM, Inc. (KERM) for for a comparative hearing. The *HDO* also dismissed the application of JEM because of an engineering deficiency in JEM's application. On October 9, 1990, JEM filed a petition for reconsideration of the *HDO* with the Chief, Mass Media Bureau, pursuant to Section 1.106 of the Commission's Rules, 47 CFR § 1.106.[1] The petition was opposed by Hendren. The Bureau has not yet acted. The Presiding Administrative Law Judge (ALJ), however, ruled on JEM's petition and denied it, stating that "[t]he pleadings were incorrectly directed to the Chief, Mass Media Bureau." *Memorandum Opinion and Order*, FCC 90M-3637, released November 16, 1980.

3. The ALJ's ruling occasioned JEM's filing, on November 19, 1990, of a motion to vacate, in which JEM argued that its petition was correctly addressed to the Bureau. Also, even while recognizing that it is not a party to this proceeding, JEM filed the instant "Contingent Appeal," pursuant to Section 1.301(a)(1) of the Rules, 47 CFR 1.301(a)(1), in the event the ALJ did not vacate his ruling. By *Order*, FCC 90M-3876, released December 10, 1990, the ALJ denied JEM's motion to vacate, reasoning that he had jurisdiction to rule on JEM's petition for reconsideration of the *HDO* because that petition "was treated as a request by JEM to certify to the Commission . . ." This latest ruling by the ALJ occasioned JEM's instant supplement to its contingent appeal and Hendren's motion to strike the supplement.

4. JEM's contingent appeal will be dismissed. First, JEM does not cite, nor is there any, authority for the filing of a "contingent appeal" with the Board. Second, Section 1.301(a) is very specific as to what matters are appealable as a matter of right and JEM's pleading concerns none of those matters. In this regard, since JEM was not a party to the proceeding, as JEM even recognizes, the ALJ's November 16, 1990 order hardly terminated its right to participate in the hearing under Section 1.301(a)(1). Finally, although the ALJ has not vacated his November 16, 1990 order, any procedural error appertaining to the Bureau's jurisdiction appears to have been corrected by his recent *Memorandum Opinion and Order*, FCC 91M-71, released January 9, 1991, which denied a settlement agreement between Hendren and KERM because the agreement was contingent upon the finality of the dismissal of JEM's application. Therein, the ALJ recognized that JEM's original petition for reconsideration of its dismissal is still pending before the Bureau, which reverses the basis for his November 16, 1990 ruling denying JEM's petition on the merits.

5. ACCORDINGLY, JEM Broadcasting Company, Inc.'s "Contingent Appeal" IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] Section 1.106(a)(1) of the Rules, in pertinent part, reads as follows:

> Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. A petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-627

In re Applications of

Barbara Maiers (hereafter "Maiers") File No. BPH-890316MC

Ephrata Broadcast Group (hereafter "Ephrata") File No. BPH-890316MH

For Construction Permit for a New FM Station on Channel 230C2 (93.9 MHz) in Ephrata, Washington

HEARING DESIGNATION ORDER

Adopted: December 11, 1990; Released: January 31, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ephrata*. Principal Joseph Weinstein ("Weinstein") is the 23.3% stockholder in Ephrata's application. Weinstein indicates in Section II, Item 7 of FCC Form 301 that he had "1/8 interest" in Big Apple Broadcasting, permittee for KSSY(FM), Wenatchee, Washington. Ephrata's proposed site and the KSSY transmitter site are approximately 37 miles apart, and there is a 3.16 mV/m (70 dBu) contour overlap between the two facilities. Therefore, Ephrata is in violation of the multiple ownership/duopoly provision of 47 C.F.R. § 73.3555(a)(2). Accordingly, an appropriate issue will be specified.

3. *Maiers*. The antenna height above average terrain (HAAT) value calculated by averaging the eight radials listed in Section V-B, Item 19 in the June 21, 1989 amendment is 154 meters. However, in Section V-B, Item 7(b)(3) of the amendment, the HAAT is listed as 150 meters. The HAAT determined by averaging the eight radials would exceed the maximum ERP/HAAT combination allowed by 47 C.F.R. § 73.211 for a Class C2 Station. Therefore, acceptance of the amendment would thus cause the dismissal of Maiers' application. The June 21, 1989 filing is therefore a "suicide amendment" and will be returned below pursuant to 47 C.F.R. § 73.3566(a) and *Golden Shores Broadcasting, Inc.*, 2 FCC Rcd. 4743 (1987). Maiers' application will be returned to the *status quo ante* and designated for comparative hearing.[1]

4. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Maiers and Ephrata would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to the Ephrata application, (BPH-890316MH) whether the common ownership of the permittee of FM station KSSY(FM), Wenatchee, WA and the proposed station is consistent with Section 73.3555 of the Commission's Rules and, if not, whether a grant of the application would be in the public interest.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Maiers and Ephrata would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the June 21, 1989 amendment filed by Maiers IS HEREBY RETURNED.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We believe that the return of Maiers' amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC*, Case No. 89-1096, Decided June 15, 1990. In that case, the court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. § 73.3571(j). The court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores*] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. *Id.*, at 7. *Golden Shores*, wrote the court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante*. " *Id.*, at 8. In *Algria*, the court noted that Heritage made no attempt to return to the *status quo ante;* rather, "the Commission permitted Heritage repeatedly to amend its application until it was viable." *Id.*, at 9. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of Maiers' amendment neither results in processing delays nor abridges any cognizable rights of other applicants. *Id.*, at 7. Finally, Maiers' application was returned to the *status quo ante* with the return of its amendment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-626

In re Applications of

PLENN H. PHELPS (hereafter "Phelps")	File No. BPH-880317MG
EMERALD COAST BROADCASTING, INC. (hereafter "ECBI")	File No. BPH-880323MG
NICEVILLE RADIO INVESTORS, INC. (hereafter "NRII")	File No. BPH-880323MH
BAY AREA BROADCASTING, INC. (hereafter "BABI")	File No. BPH-880324MJ
NICEVILLE MINORITY BROADCAST ASSOCIATES (hereafter "NMBA")	File No. BPH-880324MM
ROBERT T. ROWLAND, SR. (hereafter "Rowland")	File No. BPH-880324NA
INTERMART BROADCASTING OF WEST FLORIDA, INC. (hereafter "InterMart")	File No. BPH-880324ND
NICEVILLE RADIO LIMITED, A FLORIDA LIMITED PARTNERSHIP (hereafter "Niceville Radio")	File No. BPH-880324NF
GLENDA RAE JERNIGAN AND JACKSON COBB JERNIGAN (hereafter "Jernigan")	File No. BPH-880324NJ
WESTENBERGER FM, INC. (hereafter "Westenberger")	File No. BPH-880324NR
Lynne Waltz d/b/a L.A.W. BROADCASTING COMPANY (hereafter "L.A.W.")	File No. BPH-889324NV
NICEVILLE FM LIMITED PARTNERSHIP (hereafter "Niceville FM")	File No. BPH-880324OE

For Construction Permit
for a New FM Station on
Channel 262A (100.3 MHz)
in Niceville, Florida

HEARING DESIGNATION ORDER

Adopted: December 11, 1990; Released: January 31, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Westenberger*. Information before the Commission indicates that Westenberger was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the

Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Westenberger's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Westenberger in this proceeding.

3. *L.A.W.* In response to Section II, FCC Form 301, as to L.A.W.'s financial qualifications, L.A.W. certified that it did not have sufficient funds available to complete construction and operate the requested facilities for three months without revenues. Subsequently, on September 30, 1988, L.A.W. filed an amendment which certified that it was now financially qualified. L.A.W.'s application was put on *Public Notice* for acceptance for tender on June 6, 1988 and L.A.W. therefore, had until July 7, 1988 to file amendments as a matter of right. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). To accept amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with our acceptability requirements as of the amendment as of right date. *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *See also, Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd (1989). Accordingly, L.A.W.'s financial certification is untimely and an appropriate issue will be specified as to L.A.W.'s financial qualifications.

4. *NMBA.* Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. NMBA has published the required notice, but the notice is deficient. NMBA gives the geographical coordinates of its proposed transmitter site instead of the street address. To remedy this deficiency, NMBA must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

5. *NMBA and L.A.W.* NMBA and L.A.W. requested a waiver of 47 C.F.R. § 73.207 because their proposals, as amended on July 8, 1988 and July 6, 1988, respectively, would be short spaced to a then pending petition for rule making proposing to substitute Channel 261C2 for Channel 261A at Panama City Beach, Florida. *See Notice of Proposed Rule Making*, 3 FCC Rcd 1101 (1988). By *Report and Order* in MM Docket 88-52, 4 FCC Rcd 1598 (1989) the Commission denied the petition for rule making. Accordingly, the requests for waiver filed by NMBA and L.A.W. will be dismissed as moot.

6. *ECBI and L.A.W.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although ECBI and L.A.W. have filed such a statement, they are deficient. ECBI and L.A.W. have failed to identify specific sources of recruitment specializing in women and minority candidates. Additionally, L.A.W. has failed to identify publications the applicant will utilize in attracting women and minorities. Accordingly, ECBI and L.A.W. will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. *NRII, BABI, InterMart, Niceville Radio and Jernigan.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. NRII, BABI, InterMart, Niceville Radio and Jernigan have not completed Item 4 correctly. NRII did not give a street address for its non-voting stockholder, Love Broadcasting Company. BABI did not give a street address for the applicant. InterMart and Niceville Radio list a post office box number as the residence address for the applicant. Jernigan's application, as amended on September 17, 1990, lists a post office box number as the residence address for the applicant. Accordingly, NRII, BABI, InterMart, Niceville Radio and Jernigan must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *InterMart.* InterMart's proposal indicates that it is in the process of forming a corporation which will become the applicant. InterMart has not amended its application to indicate that such a corporation has been formed. Accordingly, InterMart will be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, indicating whether the corporation represented as the applicant for its instant proposal has indeed been formed.

9. Section II, Item 4, Form 301 (October 1986) requires that an applicant list the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. InterMart's application, as amended on March 21, 1989, added Harley P. Park as vice president and chief financial and administrative officer of the applicant. However, InterMart did not update the information required by Section II, Item 4 as it pertains to Mr. Harley. Accordingly, InterMart will be required to file an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Jernigan.* Jernigan amended its application on September 17, 1990 to report that Jackson Cobb Jernigan, co-owner of the applicant, has accepted employment as the general manager of Radio Station WWAV-FM in Santa Rosa Beach, Florida, thus triggering a potential cross interest problem. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Mr. Jernigan has indicated his intent to terminate his relationship with Station WWAV-FM in the event of a grant of the referenced application. Accordingly, an appropriate condition will be specified below.

11. *Jernigan and Niceville FM.* Jernigan's and Niceville FM's applications, both as amended on October 4, 1988, do not clearly demonstrate that they provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920HVT). Engineering study reveals that Jernigan's and Niceville FM's 3.16 mV/m contours are in substantial compliance with this requirement since their contours would cover over 80%

of the community of license. Accordingly, no waiver is required and Jernigan's and Niceville FM's requests for waiver of Section 73.315(a) will be dismissed as moot.

12. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by NMBA and L.A.W. would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

13. Jernigan proposes to mount its antenna on an existing tower structure. However, the tower data submitted in Section V-B of FCC Form 301 in Jernigan's application is inconsistent with that contained in the Commission's records. Jernigan lists the overall height above ground level (AGL) as 92 meters and the overall height above mean sea level (AMSL) as 106 meters. Commission records indicate heights of 91 meters AGL and 103 meters AMSL. Because Jernigan is clearly proposing to mount its antenna on an existing tower structure that is contained in the Commission's records, this discrepancy is neither a tenderability nor an acceptability defect and may be corrected by amendment. Accordingly, Jernigan must either file an amendment correcting the heights listed in its application or submit documentation to establish that the heights specified are, in fact, correct and the Commission's records are in error. In addition, because of the discrepancies in the heights, an FAA issue will be specified.

14. The Federal Aviation Administration has determined that the antenna proposed by BABI, Niceville Radio and Westenberger would constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

15. The applicants below have petitioned for leave to amend their applications after the last day for filing amendments as of right. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Phelps	November 3, 1988, July 24, 1989
NRII	January 30, 1989
Rowland	September 6, 1989
InterMart	August 15, 1988
Jernigan	October 4, 1988
Niceville FM	October 4, 1988

16. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right, under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting form the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
NRII	August 10, 1988, August 18, 1988, January 29, 1990, August 22, 1990
Rowland	June 20, 1989, September 6, 1989, February 26, 1990
InterMart	July 15, 1988, September 26, 1988, November 16, 1988, February 1, 1989 March 21, 1989 December 11, 1989 January 25, 1990
Jernigan	September 17, 1990
Westenberger	November 22, 1988, June 16, 1989, June 27, 1989, September 13, 1989
Niceville FM	April 10, 1989, May 31, 1989, September 15, 1989, October 6, 1989

17. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

18. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

19. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Westenberger.

2. To determine whether Westenberger's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Westenberger possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine with respect to L.A.W., whether the applicant is financially qualified.

5. To determine whether there is a reasonable possibility that the tower height and location proposed by BABI, NMBA, Niceville Radio, Jernigan, Westenberger and L.A.W. would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, NMBA shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished.

21. IT IS FURTHER ORDERED, That the requests for waiver of § 73.207 filed by NMBA and L.A.W. ARE DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, ECBI and L.A.W. shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That NRII, BABI, InterMart, Niceville Radio and Jernigan shall submit an amendment which contains the information required by Section II, Item 4 of FCC form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That InterMart shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That InterMart shall submit an amendment which contains the infromation required by Section II, Item 4 of FCC Form 301 to the Presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That in the event of a grant of Jernigan's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that Jackson Cobb Jernigan has terminated his employment at Station WWAV-FM, Santa Rosa Beach, Florida.

27. IT IS FURTHER ORDERED, That Jernigan's and Niceville FM's requests for waiver of § 73.315(a) ARE DISMISSED AS MOOT.

28. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

29. IT IS FURTHER ORDERED, That Jernigan shall submit an amendment in accordance with paragraph 13 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Phelps, NRII, Rowland, InterMart, Jernigan, Westenberger and Niceville FM ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-5

In the Matter of

Amendment of Section 73.202(b),	RM-7587
Table of Allotments,	
FM Broadcast Stations.	
(Richwood, Louisiana)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robco Communications ("petitioner") requesting the allotment of Channel 265A to Richwood, Louisiana, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 265A to Richwood, Louisiana, since it could provide the community with its first local FM service. Channel 265A can be allotted to Richwood in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Richwood, Louisiana	--	265A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shaun A. Maher
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 265A at Richwood are North Latitude 32-26-24 and West Longitude 92-04-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-6

In the Matter of

Amendment of Section 73.202(b), RM-7590
Table of Allotments,
FM Broadcast Stations.
(Oxford, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Oxford Radio, Inc. ("petitioner"), requesting the substitution of FM Channel 229A for Channel 296A at Oxford, Mississippi. Petitioner also requests the modification of its license for Station WKLJ-FM, Channel 296A, to specify operation on Channel 229A. Petitioner states its intention to file an application for Channel 229A.

2. In support of its request, petitioner states that changing from Channel 296A to Channel 229A would allow Station WKLJ-FM to increase its power to six kilowatts. According to petitioner, operation on Channel 229A at six kilowatts will result in a 36.3% increase in its existing service area so that an additional 12,062 persons will receive WKLJ-FM's increased coverage.

3. We believe the public interest would be served by proposing the substitution of Channel 229A for Channel 296A at Oxford, Mississippi, and modifying the license of Station WKLJ-FM at Oxford to specify operation on Channel 229A, as it would provide Oxford and the surrounding areas with improved service. Channel 229A can be allotted to Oxford in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site 10.3 kilometers (6.4 miles) west of the community.[1]

4. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Oxford, Mississippi	238A, 248C1 296A	229A, 238A, 248C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent J. Curtis, Jr.
Estella Salvatierra
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for the petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 229A at Oxford are 34-21-32 and 89-38-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-7

In the Matter of

Amendment of Section 73.202(b), RM-7592
Table of Allotments,
FM Broadcast Stations.
(Socorro, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Don R. Davis and William H. Pace ("petitioners") requesting the allotment of Channel 225A to Socorro, New Mexico, as the community's second local FM service.[1] Petitioners state that they will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 225A at Socorro, New Mexico, since it could provide the community with a second local FM service. Channel 225A can be allotted to Socorro in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] We recognize that the allotment of Channel 225A to Socorro conflicts with the presently licensed operation of Station KMXQ on Channel 224A at Socorro. However, the license of Station KMXQ has been modified to specify Channel 284C and the station has been issued a construction permit on the new channel (BPH-890406IF). *See* 3 FCC Rcd 2266 (1988). We will serve a copy of this *Notice* on Station KMXQ. Concurrence by the Mexican government has been requested because Socorro is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Socorro, New Mexico	284C	225A, 284C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Don R. Davis	William H. Pace
3611 Altamonte Avenue NE	10207 Karen Avenue NE
Albuquerque, New Mexico	Albuquerque, New Mexico
87110	87111
(Petitioner)	(Petitioner)

6. IT IS ORDERED, That the Secretary send a copy of this *Notice of Proposed Rule Making* to the licensee of Station KMXQ, as follows: H&HSB Corporation, P.O. Box 9595, Allentown, Pennsylvania 18105.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] H&HSB, licensee of Station KMXQ, Socorro, has pending a request to reallot Channel 284C from Socorro to Bosque Farms, New Mexico, and to modify Station KMXQ's authorization to specify the new community of license. *See* 5 FCC Rcd 4534 (1990), and counterproposal thereto. Should that request be granted, Channel 225A would represent a first local FM service at Socorro.

[2] The coordinates for Channel 225A at Socorro are North Latitude 34-03-42 and West Longitude 106-53-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-8

In the Matter of

Amendment of Section 73.202(b),	RM-7299
Table of Allotments,	
FM Broadcast Stations.	
(Appomattox, Virginia)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by LBS Broadcasting, Inc. ("petitioner"), licensee of Station WZST(FM), Channel 274B, Appomattox, Virginia, requesting the substitution of Channel 274C1 for Channel 274B at Appomattox, Virginia, and the modification of Station WZST(FM)'s license to specify operation on the higher powered channel. In order to accommodate the allotment of Channel 274C1 to Appomattox, petitioner also requests the substitution of Channel 238A for Channel 274A at Scotland Neck, North Carolina, and the modification of Station WWRT's construction permit to specify the alternate Class A allotment. Petitioner states that it will apply for Channel 274C1, if allotted to Appomattox.

2. We believe the public interest would be served by proposing the substitution of Channel 274C1 for Channel 274B at Appomattox, Virginia, since it could enable Station WZST(FM) to expand its coverage area. We need not issue an *Order to Show Cause* to WYAL Radio, Inc., permittee of Station WWRT at Scotland Neck, since we have authorized a modification of its construction permit to specify operation on Channel 238A as a component of a proposal filed by Lawrence F. and Margaret A Loesch ("the Loeschs") to substitute Channel 273C2 for Channel 272A at Edenton, North Carolina.[1] However, we note that petitioner has not made the required commitment to reimburse WYAL Radio for the reasonable costs associated with the change in its channel. Commission policy requires a benefitting party to reimburse an authorized facility for the reasonable cost associated with a change in its operating channel. *See Circleville, Ohio*, 8 FCC 2d 159 (1967). Both this petitioner and the Loeschs will benefit from the change in Station WWRT's operating channel. Therefore, petitioner must state its willingness to share the costs associated with the change in WWRT's channel with the Loeschs.

3. Channel 274C1 can be allotted to Appomattox in compliance with the Commission's minimum distance separation requirements with a site restriction of 4 kilometers (2.5 miles) southeast to accommodate petitioner's desired transmitter site.[2] We shall also propose to modify petitioner's license for Station WZST(FM) to specify operation on Channel 274C1. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 274C1 at Appomattox or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Appomattox, Virginia	274B, 296A	274C1, 296A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **March 22, 1991,** and reply comments on or before **April 8, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Cary S. Tepper
Putbrese, Hunsaker & Ruddy
6800 Fleetwood Road
P.O. Box 539
McLean, VA 22101
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order*, MM Docket No. 90-473, adopted January 14, 1991.

[2] The coordinates for Channel 274C1 at Appomattox are North Latitude 37-19-55 and West Longitude 78-47-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-444

In the Matter of

Amendment of Section 73.202(b), RM-7240
Table of Allotments,
FM Broadcast Stations.
(Dexter, Maine)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5942 (1990), issued in response to a petition filed by Daniel F. Priestley ("petitioner"), proposing the substitution of FM Channel 271C2 for Channel 271A at Dexter, Maine. Petitioner also requested modification of his construction permit for Station WGUY, Channel 271A, to specify operation on Channel 271C2. Innovative Advertising Consultants, Inc., assignee of the permit for Station WGUY,[1] filed comments stating its interest in Channel 271C2. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 271C2 for Channel 271A at Dexter, Maine, since it could provide the community with a wide coverage FM station. The substitution can be made in compliance with the minmum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] Since Dexter is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained. The application for Channel 271C2 at Dexter must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine. In addition, we have authorized a modification of the construction permit for Station WGUY, Channel 271A, Dexter, Maine, to specify operation on Channel 271C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Dexter, Maine	271C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WGUY, Channel 271A, Dexter, Maine, IS MODIFIED to specify operation on Channel 271C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] An assignment of the construction permit for Station WGUY, Channel 271A, from Daniel F. Priestley to Innovative Advertising Consultants, Inc., was consummated on September 26, 1990. (File No. BAPH-900719HR). Innovative is a corporation wholly owned and controlled by Daniel F. Priestley.

[2] The coordinates for Channel 271C2 are 45-01-00 and 69-00-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-90-135

Application for authority to acquire and operate capacity in the PTAT-1 cable system for the provision of authorized common carrier service between the U.S. and France

ORDER AND AUTHORIZATION

Adopted: January 7, 1991; Released: January 31, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 13 and amended on June 14, 1990 by TRT/FTC Communications, Inc. (TRT/FTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the France and beyond. The application was placed on public notice on June 27, 1990. No comments were received.

2. The Commission stated in its *Private Submarine Cable decision* [1] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[2] TRT/FTC has been previously authorized to acquire and operate facilities in PTAT-1 for service between the U.S., on the one hand, and the United Kingdom, Ireland and Bermuda. [3] TRT/FTC is also authorized to provide service between the U.S. and France using facilities other than PTAT-1. In the instant application, TRT/FTC requests authority to acquire and operate one E-1 (2.048 Mbps) circuit in the PTAT-1 cable between the U.S. and the United Kingdom and to lease and operate connecting facilities to the border of France for the provision, as a dominant carrier under the Commission's rules, of its regularly authorized services between the U.S. and France.[4]

3. In this order, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's rules.[5] Furthermore, we note that no one has raised any issues that would suggest that the TRT/FTC application to use PTAT-1 will result in traffic diversion from existing or planned common carrier facilities.[6] Nevertheless, we remain concerned with the potential implications of the TRT/FTC "exclusive gateway" operating arrangement with France and therefore condition our grant upon TRT/FTC complying fully with any current and future Commission policy and requirements concerning international accounting and settlements and the conditions that the Commission imposed upon US Sprint's authorization for service to Germany.[7]

4. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-135 IS GRANTED, and TRT/FTC is authorized, subject to the conditions discussed above concerning compliance with the Commission's ISP and other requirements, to:

a. acquire, on an indefeasible right of user (IRU) basis, a one-half interest in one E-1 circuit in the PTAT-1 cable;

b. acquire a 15-year Droit De Passage (DDP) interest in one E-1 half-circuit in landline facilities between the PTAT-1 cablehead at Brean and UK-France No. 3 cablehead at Brighton;

c. acquire, on an IRU basis, one E-1 half circuit in the U.K.-France No. 3 cable system;

d. lease and operate any necessary domestic connecting facilities; and

e. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and France and beyond.

6. IT IS FURTHER ORDERED that TRT/FTC shall file a copy of any operating agreement for France entered into within 30 days of its execution.

7. IT IS FURTHER ORDERED that TRT/FTC shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and France within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant SHALL FILE the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that TRT/FTC shall file annual traffic and revenue reports as provided in the Section 43.81 of the Commission's Rules 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

11. IT IS FURTHER ORDERED that TRT/FTC shall file semi-annual circuit addition reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

12. IT IS FURTHER ORDERED that TRT/FTC shall file additional Section 214 applications to supplement existing facilities to France.

13. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications

Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-49).

14. This order is issued under Section 0.291 of the Commission's Rules and is effective on adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *Tel-Optik, Ltd.*, 100 FCC 2d 1033 (1985).

[2] In *International Competitive Carrier*, the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[3] *See* AT&T Co., 98 FCC 2d 440 (1984) and American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988). We also note that FTCC, which has been merged into TRT/FTC, previously has been authorized to acquire circuits in the PTAT-1 cable system. *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989), FTC Communications, Inc., 5 FCC Rcd 3328 (Com. Car Bur. 1990), TRT/FTC, 5 FCC Rcd 3853 (Com. Car. Bur. 1990), TRT/FTC, 5 FCC Rcd 6668 (Com. Car. Bur. 1990), and TRT/FTC Communications, Inc., DA 90-1863, released December 28, 1990, File No. I-T-C-90-179.

[4] TRT/FTC recently merged with FTC Communications, Inc. (FTCC) with TRT/FTC being the surviving company. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC, from the Chief, International Facilities Division. In FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling*), because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier*). However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. As a result of the merger, TRT/FTC is now deemed to be a dominant carrier for the provision of all services between the U.S. and France.

[5] The Commission places no special burden on any carrier making an application for private cable capacity. *See Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables*, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies*).

[6] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

[7] This includes, for example, TRT/FTC following principles of nondiscrimination or equal treatment, including routing of a proportionate share of inbound traffic to the domestic network of its carrier competitors. *See e.g.*, FTC Communications, Inc., Petition for Declaratory Ruling, File No. I-S-P-89-003, 4 FCC Rcd 5633 (1989). *See also* US Sprint, Memorandum Opinion, Order, Authorization and Certificate, 3 FCC 1484 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure

REQUEST FOR INFORMATION TO SUPPLEMENT THE RECORD

Adopted: January 14, 1991; Released: January 16, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In 1984, the Commission adopted a Notice of Proposed Rule Making (*Notice*) to consider issues relating to the waiver of the Commission's Rules prescribing a rate structure for recovering the costs of providing transport access facilities.[1] Since that *Notice* was adopted, there have been numerous changes in the structure of the telephone industry and in Commission regulations affecting that industry. Therefore, we request that interested parties file comments to update the record.

II. BACKGROUND

2. In the *Access Charge Order*,[2] the Commission adopted rules for recovering costs of local exchange carrier (LEC) transmission and switching facilities used by interexchange carriers (IXCs) to originate and terminate interstate traffic. [3] A LEC can transport this traffic through facilities dedicated to the use of one interexchange carrier, or by combining dedicated facilities with facilities used in common by several interexchange carriers. The *Access Charge Order* directed carriers to allocate transport costs between two access rate elements: "dedicated transport" and "common transport."[4] The dedicated transport element would have included the costs of voice grade transmission facilities dedicated to an IXC's use, the costs of conditioning those facilities, and the costs of any additional central office equipment used to provide interface arrangements.[5] The common transport element would have included the costs of trunks used by more than one IXC and access tandems used to transmit interstate switched traffic between IXC facilities and the LEC end office.[6] The Commission established a rate structure for each element that reflected the nature of the costs associated with the transport facilities provided to the IXC. The *Access Charge Order* prescribed a usage-sensitive rate structure for the common transport element[7] but a flat, per-line rate structure for the dedicated transport element.[8]

3. In 1982, the United States District Court for the District of Columbia adopted the Modification of Final Judgment (MFJ) in *United States v. AT&T*.[9] The MFJ, like the transport rules prescribed in Part 69 of the Commission's Rules, required that the BOCs file cost-based tariffs for access services.[10] For transport charges, however, the MFJ delayed the effective date of this requirement, and required that until September 1, 1991:

> Charges for delivery or receipt of traffic of the same type between end offices and facilities of interexchange carriers within an exchange area, shall be equal, per unit of traffic delivered or received, for all interexchange carriers.[11]

4. On March 17, 1983, AT&T and the Bell Operating Companies filed a petition requesting that the Commission waive the Part 69 transport rules to the extent that these rules conflicted with the MFJ equal charge per unit requirement.[12] The Commission granted a waiver of those rules, and permitted LECs to impose charges for transport that did not comply with Sections 69.111 and 69.112 of the Commission's Rules, 47 C.F.R. §§ 69.111 and 69.112.[13] The Commission provided that the waiver would expire December 31, 1984. The Commission subsequently extended the waiver through May 31, 1985.[14]

5. On December 28, 1984, the Commission issued a Notice of Proposed Rule Making in this docket to reexamine issues related to the transport waiver. The *Notice* invited comment on whether to extend, modify or restrict in scope the waiver of the Commission's transport rules. The Commission also sought comment on whether to modify the access charge rules for dedicated or common transport, and whether to impose cost-based pricing requirements for dedicated and common transport upon IXCs prior to the expiration date of the MFJ provision.[15] Finally, the *Notice* requested comment on whether some combination of waiver provisions and transport rule modifications would achieve the objectives of the access charge proceeding and the MFJ.[16] Subsequently, the Commission indefinitely extended the waiver of the transport rules to provide additional time for Commission staff to study and analyze transport issues.[17]

III. DISCUSSION

6. In the six years following adoption of the *Notice*, there have been changes in the telecommunications industry that may affect the way the Commission will analyze the issues raised in this proceeding. We briefly list a few of these changes below, and request that interested parties describe what, if any, relevance such changes may have for the resolution of issues raised in this proceeding.

7. As the Commission noted in the *Interexchange Proceeding*, the extent and nature of interexchange competition have changed significantly.[18] Alternative access providers have begun to compete with LECs in the provision of interstate access service, and have requested expanded interconnection to the BOC networks.[19] In addition, the physical network is changing with the development of new technologies such as Signaling System 7 and Integrated Services Digital Network. The Commission has also undertaken a variety of regulatory initiatives. With the implementation of the Commission's Subscriber Line Charge program, interstate switched access charges have decreased substantially.[20] The Commission's Open Network Architecture program[21] and the recent implementation of price cap regulation for the LECs[22] are two other examples of significant regulatory changes in the past six years. Parties have not had an opportunity in this

proceeding to comment upon these and other changes. Therefore, we request that interested parties update the record by addressing what, if any, relevance recent developments may have for the resolution of the issues raised in the Commission's Notice of Proposed Rule Making.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291 that COMMENT IS INVITED in this proceeding.

9. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before February 22, 1991, and reply comments SHALL BE FILED with the Secretary on or before March 22, 1991. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Docket Reference, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MTS and WATS Market Structure, Notice of Proposed Rule Making, CC Docket No. 78-72, Phase I, FCC 84-604, 49 Fed. Reg. 50,413 (1984); 47 C.F.R. §§ 69.111-69.112

[2] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Third Report and Order*, 93 FCC 2d 241 (1983) (*Access Charge Order*), *modified on reconsideration*, 97 FCC 2d 682 (1983), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (*Second Reconsideration Order*), *affirmed in principal part and remanded in part*, National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *affirmed on further reconsideration*, 102 FCC 2d 849 (1985).

[3] *Access Charge Order*, 93 FCC 2d at 309, para. 230.

[4] *See* American Telephone and Telegraph Company, Petition for Waiver of Sections 69.1(b), 69.3(e), 69.4(b)(7) and (8), 69.101, 69.111 and 69.112 of the Commission's Rules and Regulations, 94 FCC 2d 545, 546, para. 2 (1983) (*Waiver Order*).

[5] *Access Charge Order*, 93 FCC 2d at 310, para. 233.

[6] *Id.* at 313, para. 241; *see also Waiver Order*, 94 FCC 2d at 546, para. 2.

[7] *Waiver Order*, 94 FCC 2d at 546, para. 2; *see* 47 C.F.R. § 69.111.

[8] *Waiver Order*, 94 FCC 2d at 546, para. 2; *see* 47 C.F.R. § 69.112.

[9] 552 F.Supp. 131 (D.D.C. 1982), *affirmed sub. nom.*, Maryland v. United States, 103 S.Ct. 1240 (1983).

[10] *See* MFJ, Appendix B, Section B.

[11] MFJ, Appendix B at para. B(3).

[12] *See Waiver Order*, 94 FCC 2d at 547, para. 4.

[13] *Waiver Order*, 94 FCC 2d 545 (1983).

[14] *Second Reconsideration Order*, 97 FCC 2d at 862, para. 88.

[15] MTS and WATS Market Structure, Notice of Proposed Rule Making, CC Docket No. 78-72, Phase I, FCC 84-604, 49 Fed. Reg. 50,413, para. 13 (1984).

[16] *Id.*

[17] MTS and WATS Market Structure, Memorandum Opinion and Order, CC Docket No. 78-72, Phase I, FCC 85-87, 50 Fed. Reg. 9633, para. 7 (1985).

[18] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rule Making, 5 FCC Rcd 2627 (1990).

[19] *See* MFS Petition for Rule Making, Pleading Cycle Established on Metropolitan Fiber Systems' Petition on Interconnection of Competitive Carrier Access Facilities, 5 FCC Rcd 726 (1990).

[20] *See, e.g.*, MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Report and Order, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 2953 (1987), *NTS Recovery Reconsideration*, Memorandum Opinion and Order on Reconsideration and Order Inviting Comments, 3 FCC Rcd 4543 (1988).

[21] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1 (1988) (*BOC ONA Plans Order*), *recon.*, 5 FCC Rcd 3084 (1990) (*BOC ONA Reconsideration Order*), Memorandum Opinion and Order 5 FCC Rcd 3103 (1990) (*BOC ONA Amended Plans Order*).

[22] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-3 File No. 10570-CL-P-599-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 599, Oklahoma 4 - Nowata

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Jackson Cellular Partnership (Jackson) filed a Petition to Dismiss or Deny the application of Progressive Cellular III B-3 (Progressive), the tentative selectee in the above-captioned rural service area (RSA). Progressive's Frequency Block A (non-wireline) application was selected first in a lottery held on August 9, 1989. *See Public Notice*, Rpt. No. CL-89-246, Mimeo No. 3992 (released Aug. 10, 1989). Progressive filed an opposition to Jackson's petition. For the reasons set forth below, we are dismissing Progressive's application.

I. CONTENTIONS OF THE PARTIES

2. Jackson asserts that Progressive's application should be dismissed for violating Section 22.921(b)(1) of the Commission's rules, which prohibits any ownership interest in more than one application for the non-wireline block for the same RSA.[1] Jackson states that the ownership exhibit of Progressive's application reflects that Dennis E. Thomas, who is Progressive's Managing General Partner and its signatory, and Jack N. Thomas (collectively, the Thomases)[2] each own 28 percent of Progressive. Jackson further states that the ownership exhibit of Rubana Cellular Co. South Central (Rubana), another applicant in the same RSA, reflects that the Thomases each own a 3.22481 percent partnership interest in Advanced Cellular Company (Advanced), which is a 30.340 percent partner in Rubana. Jackson further contends that Progressive's failure to report the Thomases' multiple ownership constitutes a lack of candor and a misrepresentation before the Commission. According to Jackson, Progressive and Dennis E. Thomas must have known when Progressive's application was certified that the Thomases were already parties to the Rubana application, but did not disclose this information. Jackson points out that while Progressive timely amended its application on September 11, 1989, its amendment did not contain any disclosure pertaining to the Thomases' multiple ownership interests, in violation of Section 1.65 of the Commission's rules. Jackson contends Progressive chose to omit from its amendment decisionally significant but adverse information.

3. In opposition, Progressive asserts that neither of the Thomases knew of the inclusion of their names in Rubana's application. Progressive states that when the Thomases entered into the Advanced partnership agreement, they understood that Advanced's cellular involvement would be limited solely to entry into various Metropolitan Statistical Area (MSA) lotteries for markets 121 through 150 and were never advised that Advanced would participate in any subsequent RSA lotteries. According to Progressive, Advanced's participation in RSA lotteries as a Rubana partner was outside Advanced's authorized scope of business and could not have been reasonably anticipated by the Thomases. Progressive asserts that when the Thomases found out about their inclusion in the Rubana RSA applications on December 27, 1988, they withdrew from the Advanced partnership retroactive to May 23, 1988. Finally, Progressive asserts that the Thomases could not be made parties to the Rubana applications absent their knowledge and assent and the Thomases were not real parties in interest to the Rubana application for the Oklahoma 4 RSA. Moreover, Progressive asserts that, under the circumstances, it is not appropriate to dismiss Progressive's application.

4. Progressive argues that, contrary to Jackson's assertions, Progressive has complied fully with its obligations of candor to the Commission. It states that the statements contained in Progressive's application certified by Dennis E. Thomas were true, based on his knowledge of facts at the time of the certification. Thus, Progressive asserts, there was no misrepresentation, lack of candor, or a knowing intent to deceive. Progressive further contends that it has complied fully with all Commission reporting obligations, and that because the Thomases had no interest in the Rubana application they had no duty to disclose. Progressive contends that as of the August 9, 1989 lottery for the Oklahoma 4 RSA all actions relating to the severance of the Thomases from the Advanced partnership and the conveyance to them individually of their *pro-rata* MSA equivalent partnership interests had been accomplished. Thus, Progressive concludes, there was nothing concerning this matter appropriate for reporting to the Commission by the Thomases or Progressive.

II. DISCUSSION

5. Section 22.921 prohibits any party from holding *any* interest in two applications for the same RSA market. It is uncontroverted that the Thomases had interests in both the Progressive and Rubana applications. No corrective action by the Thomases can alter the fact that Progressive's application, at the time it was filed, was defective. In the *Third Report and Order*, 4 FCC Rcd 2440 (1988), the Commission amended Section 22.921 to forbid any ownership in more than one application for the non-wireline block for the same RSA market, specifically superseding the earlier prohibition against multiple ownership interests exceeding one percent for MSA markets. This action indicates the importance the Commission has placed on not permitting any multiple ownership interests by non-wireline applicants. Section 22.20 of the Commission's rules provides that an application will be returned to the applicant as unacceptable for filing if the applicant fails to comply with the Commission's rules. [3] Progressive's application violated the prohibition against a party having ownership interests in more than one application in a market. Progressive's explanations for its violations do not

overcome the Commission's strict policy embodied by Section 22.921 of the rules. Partnership law generally holds that the actions of one partner bind all other partners in the partnership. In that the Thomases were partners in Advanced, and Advanced was a partner in Rubana, Advanced's actions bound the Thomases through the Rubana filing.[4] The Thomases' actions retroactively withdrawing from the Advanced partnership do not cure the defect in the application as filed with the Commission. "Being unacceptable for filing, an application may not be amended after the filing date or after the lottery to bring it into compliance with the rules." *Rem Communication*, 3 FCC Rcd 3705 (1988). Because we have found Progressive's application defective for violating Section 22.921, we need not address Jackson's other arguments.

6. In sum, there are no compelling factual or public interest reasons warranting an exception to compliance with Section 22.921 by Progressive or the Thomases. Accordingly, Progressive's application will be returned as defective. Similarly, the Rubana application, owned in part by the Thomases, was defective at the time it was filed and will also be returned.

III. ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the Petition to Dismiss or Deny filed by Jackson Cellular Partnership IS GRANTED.

8. IT IS FURTHER ORDERED that the application of Progressive Cellular III B-3, File No. 10570-CL-P-599-A-89, IS DISMISSED.

9. IT IS FURTHER ORDERED that the application of Rubana Cellular Co. South Central for RSA Market No. 599, Fee No. 9187787, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.921(b)(1) provides in pertinent part:

> For Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent.

[2] Jack N. Thomas is the father of Dennis E. Thomas.

[3] Section 22.20 states in pertinent part:

> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant . . . if:
>
> (2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

[4] Claims involving breach of contract, violations of fiduciary duties or delegated authority memorialized in a partnership agreement, and monetary harm are considered private disputes that are more properly resolved in a local, judicial forum. *See Sonderling Broadcasting Co.*, 46 Rad. Reg. 2d (P&F) 890, 894 (1979); *John R. Kingsbery*, 71 FCC 2d 1173, 1174 (1979); *Rodney A. McDaniel*, 4 FCC Rcd 1736 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED
PUBLIC NOTICE

Released: January 14, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CONAP'S PETITION FOR INVESTIGATION OF ADVANCED INTELLIGENT NETWORK

On November 16, 1990, the Coalition of Open Network Architecture Parties (CONAP) filed a petition requesting that the Commission initiate an investigation pursuant to Section 218 of the Communications Act. CONAP specifically requests that the Commission investigate: (1) the architecture that the Regional Bell Operating Companies (RBOCs) intend to use in implementing the Advanced Intelligent Network (AIN); (2) the architecture of the switches that the RBOCs have purchased or intend to purchase in 1990-93; and (3) the RBOCs' intentions with respect to implementation of a modular and transparent network architecture. CONAP proposes a set of questions that it believes will assist the Commission in framing an investigation.

Interested parties should file comments on this petition by **February 28, 1991,** and reply comments by **March 18, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Suite 140, Washington, D.C. 20037. Copies of CONAP's petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 25, 1991

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITIONS FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On January 7, 1991, the Commission received a petition for waiver filed by Scandinavia Telephone Company (Scandinavia); Badger Telecom, Inc. (Badger); Midway Telephone Company (Midway); Mt. Vernon Telephone Company (Mt. Vernon); and Eastcoast Telecom, Inc. (Eastcoast). The petitioners seek waivers of the Commission's equal access implementation requirements for independent telephone companies.

The petitioners state that on March 15, 1988, they received a letter from MCI Telecommunications Corporation (MCI) requesting that they convert their facilities to equal access. Pursuant to Commission order, the companies are required to complete the equal access conversion within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three-year time period will end March 15, 1991.

Three companies -- Scandinavia, Badger, and Midway -- request an additional five and one-half months, until September 1, 1991, to complete the equal access conversion. Eastcoast requests an additional two and one-half months, until May 1, 1991, to complete its equal access conversion. Mt. Vernon requests an additional twelve and one-half months, until April 1, 1992, to complete its equal access conversion. The petition states that, in each case, the additional time is necessary because the software required to implement equal access will not be delivered in time to implement equal access by the March 1991 deadline. The companies propose new dates, based on their scheduled software delivery dates, and state that they anticipate that the equal access conversions will be completed by the proposed dates. The petition adds that MCI does not object to the proposed new dates for equal access implementation.

Interested parties should file comments on the petition by **February 11, 1991,** and reply comments by **February 21, 1991,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20037. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions
from digital devices.

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: January 2, 1991; Released: February 1, 1991

By the Commission:

INTRODUCTION

1. In the *Notice of Proposed Rule Making* (*NPRM*) in this proceeding, the Commission proposed to replace MP-4, the test procedure currently used by the Commission to determine compliance of digital devices with the Rules, with a new procedure designated TP-5.[1] Based upon comments received on this proposal and recent efforts by industry and the Commission staff, the Commission is now proposing to adopt the American National Standards Institute's (ANSI) measurement procedure C63.4-1991 as its test procedure for digital devices rather than TP5.[2] The C63.4-1991 test procedure, which incorporates much of the technical framework and initiatives set forth in TP-5, was developed in a joint effort by the Commission staff, the ANSI C63 Committee, and industry representatives.[3] It represents a consensus agreement among these parties to resolve the many technical issues that were raised in response to the *NPRM*.

BACKGROUND

2. MP-4, which was adopted by the Commission in 1983, specifies uniform methods for measurement of radiated and line conducted emissions from both large and small digital devices.[4] It describes in detail the environment, the instrumentation, and other test conditions to be used in such testing. In March of 1989, the Commission initiated this proceeding to undertake a comprehensive review and revision of its measurement procedure for digital devices. In the *NPRM*, the Commission proposed to replace MP-4 with a new procedure TP-5. The new procedure was designed to provide clearer guidance on how to perform the measurements based on the FCC's experience and suggestions made by the computer industry and measurement experts.

3. A total of 41 parties, consisting of individuals, trade associations, computer manufacturers, and test firms, filed comments in this proceeding. Sixteen parties filed reply comments. A list of the parties filing comments and reply comments is contained in Appendix A. The comments filed in response to the *NPRM* suggest numerous changes to the proposed test procedure. In many cases, the commenting parties disagree on the appropriate approach for specific aspects of the test procedure. Many commenting parties do, however, agree with the proposal in the *NPRM* that the FCC procedure for measuring emissions from digital devices be generally harmonized with the international test procedures set forth in CISPR Publication 22.[5] In addition, several parties recommend that the Commission adopt ANSI test procedure C63.4-1988 as the standard for testing digital devices. C63.4-1988 is a nationally recognized test procedure for measuring radio-noise emissions from all types of low-voltage electrical and electronic equipment in the range of 9 kHz to 1 GHz.[6] The ANSI Accredited Standards Committee on Electromagnetic Compatibility, C63, filed reply comments stating that it would revise C63.4-1988 to address many of the issues raised by the Commission and commenting parties in this proceeding.

DISCUSSION

4. The development of test procedures for measuring radio-noise emissions is an area that typically involves state-of-the-art techniques and, because of this, there is often considerable disagreement among measurement experts as to the best approach to specific points in the process. Upon examining the comments, we concluded that, despite the improvements incorporated into TP-5, there were still many reasonable differing viewpoints on the best way to test digital devices and that it would be difficult to obtain a test procedure that would best represent a consensus of industry viewpoints.

5. In considering this problem, we observed that the process of revising ANSI test procedures, such as C63.4-1988, utilized by the C63 Committee could provide the means to obtain a consensus agreement among the concerned industry parties. Our staff, therefore, approached the C63 Committee with a request to expeditiously modify ANSI C63.4-1988.[7] Subsequently, a joint effort between the Commission staff and the ANSI C63 Committee, which includes many concerned industry parties, was initiated to revise and modify C63.4-1988 for use in testing digital devices. The staff made numerous technical contributions to this work and helped lead the activity. The resulting test procedure, C63.41991, basically follows the technical framework and initiatives set forth in the TP-5 proposal.

6. In light of the above developments, we now believe the public interest would be best served by employing ANSI C63.4-1991 as the procedure for performing radio-noise emissions measurements for digital devices. C63.4-1991 represents a substantial advance over both the earlier C63.4-1988 and the Commission's proposed TP-5. For example, an entire section is devoted to measurement of digital devices. Further, an Appendix provides step-by-step guidance for testing personal computers and associated peripherals. In addition, C63.4 provides for validation of test sites. We also note that the C63 Committee, with guidance from the Commission's staff, took into account all of the various technical viewpoints and issues raised by the commenters in this proceeding. The final document resolves these matters in a technically competent and balanced manner. We believe that ANSI C63.4-1991 represents the current, state-of-the-art standard with respect to measurement of radiated and conducted emissions from digital and other similar electronic devices.

7. We also believe that employing ANSI C63.4-1991 will advance U. S. nternational interests. There is a growing trend towards nternational standardization of measurement procedures and emissions limits for computer equipment. This trend is a result of several factors: 1) the desire to avoid expensive, multiple compliance tests necessitated by differing national technical standards, 2) the need to reduce marketing delays related to these differing technical requirements, and 3) most importantly, the unification of the European Community (EC) to one ITE technical standard.[8] The EC is expected to base its standards for computer equipment on CISPR Publication 22 in January of 1992. Other countries such as Japan, Canada, and Australia have either implemented, or are moving towards implementation, of the CISPR 22 standard.[9] ANSI C63.41991 is generally consistent with the test procedures contained in CISPR 22 and, therefore, will make the U.S. test procedures essentially equivalent to those of other countries using CISPR 22. The principal difference between ANSI C63.41991 and CISPR 22 is that ANSI C63.4-1991 provides additional detail that will help to ensure repeatable results. Accordingly, we believe that ANSI C63.4-1991 would satisfy the Commission's need to have clearly specified measurement procedures while at the same time promoting international harmonization of measurement standards. Use of a measurement procedure that is consistent with an internationally recognized and accepted standard would also encourage international trade. We note that ANSI, the U.S. representative to the CISPR, is planning to propose to CISPR an expansion of the CISPR Publication 22 measurement procedures to be more compatible with the revised ANSI C63.4-1991.

8. In view of these considerations, we are proposing to amend Part 15 of the Rules to incorporate by reference ANSI C63.4-1991 as the procedure to be used by the Commission for performing radio-noise emission measurements on digital devices. This action is consistent with the intent of Office of Management and Budget (OMB) Circular A-119, which urges government agencies to use industry developed standards rather than develop their own. Notwithstanding this proposal, there are three sections of ANSI C63.4-1991 that we would not permit to be used in determining compliance of a digital device with the FCC Rules. We would not permit the use of Section 5.7, which specifies the use of an artificial hand when measuring hand-held equipment. The procedure in this section can yield lower measured emission levels. We believe that the use of an artificial hand is inappropriate because hand-held equipment is not always held in the hand while in operation. We also would not accept absorbing clamp measurements as a substitute for measuring radiated emissions as provided in Section 9. The Commissions limits are based on measurements of radiated emissions. There is insufficient evidence to show that the results obtained with an absorbing clamp can be correlated with radiated emissions from digital electronic equipment. Finally, we would not allow the relaxation of the limits for "click" or short duration emissions as provided in Section 15. Short duration emissions can produce as much nuisance to radio communications as continuous emissions.

9. Currently, the Commission requires the filing of a test site description pursuant to Section 2.948 of the Rules, including measurements showing compliance with the horizontal test site attenuation values specified in FCC Office of Engineering and Technology Bulletin 55 (OET 55). The TP-5 *NPRM* proposed no changes in this area. Many of the commenters state that OET 55 is not adequate for determining test site acceptability because of the following: 1) it does not permit the use of broadband antennas; 2) it does not use a current theoretical site attenuation model; and 3) it does not include vertical site attenuation measurements. They argue that the Commission could not achieve the objective of ensuring reliable and repeatable measurements without first addressing these issues. They strongly favor implementation of the test site performance criteria in ANSI C63.4-1988. We agree with the commenters who state that test site performance is critical to obtaining repeatable results and that the procedures in OET 55 could be improved by incorporating the changes in the ANSI document. Accordingly, we are proposing to amend Section 2.948 to require submission of both horizontal and vertical site attenuation data that meets the performance criteria in ANSI C63.4-1991 for test sites used to perform measurements on digital devices.

10. We recognize that a time period for transition to the new measurement procedure and test site requirements is necessary. Therefore, we propose to implement the use of C63.4-1991 for equipment authorization applications filed on or after June 23, 1992. This date coincides with the transition provisions in Section 15.37 of the Rules, 47 CFR § 15.37. After C63.4 is adopted, but before June 24, 1992, either MP-4 (1987) or C63.4-1991 would be permitted to be used for testing a digital device to determine compliance with Subpart J of Part 15 of the Rules.

PROCEDURAL MATTERS

11. Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before *(75 days after publication in the Federal Register)*, and reply comments on or before *(105 days after publication in the Federal Register)*. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554. A copy of C63.4-1991 has been placed in the docket binder for this proceeding and is available for inspection with the comments and reply comments. Additional copies of ANSI C63.4-1991 may be obtained from:

IEEE Standards Department
445 Hoes Lane
P. O. Box 1331
Piscataway, NJ 08855-1331
Phone: (201) 562-3800

12. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

13. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.12.2(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

14. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

15. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 603, the Commission's initial analysis is as follows:

I. Need and purpose of this action:

In the course of performing testing on digital devices at the Commission's Laboratory, a significant percentage have been found to be non-compliant with the radio frequency (RF) emission limits in the Rules. Revisions to the procedure are believed necessary in order to provide more specific information on how the Commission is testing such devices. We believe it is necessary to incorporate the test procedure into the Rules by reference to provide adequate notice to the public on how digital devices are actually tested by the Commission.

II. The objectives:

Our objectives in proposing these changes are to clarify, and where possible, simplify the test procedures for digital devices. By providing additional guidance on how the Commission tests digital devices, it is hoped that the compliance rate for these devices will be increased. Also, we wish to provide an opportunity for industry to comment on the proposed changes.

III. Legal basis:

The actions proposed herein are taken pursuant to the authority contained in Sections 4(i), 301, 302 and 303 of the Communications Act of 1934, as amended.

IV. Description, potential impact and number of small entities affected:

The proposed changes will potentially affect all manufacturers of digital devices, and laboratories performing certification and verification tests on such devices, but the exact number of small entities affected is not known. It is believed that clarification and simplification of the test procedure will benefit manufacturers and test laboratories by speeding testing and reducing compliance costs. Additionally, increasing the compliance rate for devices tested at the Commission's Laboratory will allow manufacturers to obtain approval for new products more quickly, and therefore to market them more quickly.

V. Reporting, record keeping and other compliance requirements:

Parties performing measurements for certification of digital devices will be subject to a new requirement to file horizontal and vertical site attenuation data of their measurement facility which shows conformance with the criteria of ANSI C63.4-1991. The information that must be submitted is similar to the current information requirement to submit only horizontal site attenuation data taken pursuant to Office of Engineering and Technology Bulletin 55 (OET 55) using tuned dipole antennas. Although twice the originally-required information will be collected, the new procedure simplifies the collection process so the new information can be collected in the same time as the originally-required information. The new information is needed to provide additional information on test site performance to ensure repeatable test results. No other changes in reporting or record keeping requirements are proposed.

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on businesses using open field test sites to test RF emissions from digital devices. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VI. Federal rules which overlap, duplicate or conflict with this rule:

None.

VII. Any significant alternatives minimizing impact on small entities and consistent with the stated objectives:

None.

16. For further information on this proceeding, contact Richard F. Fabina or Art Wall, FCC Laboratory, 7435 Oakland Mills Road, Columbia, MD 21046, (301) 725-1585.

PROPOSED CHANGES TO THE REGULATIONS

A. Title 47 of the Code of Federal Regulations, Part 2, is proposed to be amended as follows:

1. The authority citation for Part 2 would continue to read as follows:

Authority: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.948, would be amended by revising paragraph (b) (8) to read as follows:

Section 2.948 Description of measurement facilities.

*****

(b)* * *

(8) A plot of site attenuation data.

(i) For a measurement facility that will be used for testing radiated emissions from digital devices, the site attenuation data shall be taken pursuant to ANSI C63.4-1991.

(ii) For a measurement facility that will be used for testing radiated emissions from devices other than digital devices, the site attenuation data shall be taken pursuant to either ANSI C63.4-1991 or FCC Bulletin OET 55.

*****

B. Title 47 of the Code of Federal Regulations, Part 15, is proposed to be amended as follows:

1. The authority citation for Part 15 would continue to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. Section 15.31 would be amended by revising paragraph (a) to read as follows:

Section 15.31 Measurement standards.

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements. Except where noted, copies of these procedures are available from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161 or from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office.

(1)FCC/OET MP-1: FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers.

(2)FCC/OET MP-2: Measurement of UHF Noise Figures of TV Receivers.

(3)FCC/OET MP-3: FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics and Radio Noise Emissions from TV Interface Devices.

(4)FCC/OET MP-9: FCC Procedures for Measuring Cable Television Switch Isolation.

(5)American National Standards Institute (ANSI) measurement procedure C63.41991 is incorporated by reference as the procedure the FCC will employ for making radio-noise emissions measurements of digital devices, excluding Sections 5.7, 9 and 15 of that document. ANSI C63.4-1991 is available from IEEE Standards Department, 455 Hoes Lane, P. O. Box 1331, Piscataway, NJ 08855-1331, Telephone (201) 562-3800.

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FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A - PARTIES FILING COMMENTS TO TP-5 PROPOSAL

Accredited Standards Committee on Electromagnetic Compatibility, C63
Amador Corporation
American Council of Independent Laboratories, Inc.
American Telephone and Telegraph Company
Apple Computer, Inc.
Bronaugh, Mr. Edwin L.
Cardinal Technologies, Inc.
Carl T. Jones Corporation
Communication Certification Laboratory
Compaq Computer Corporation
Computer and Business Equipment Manufacturers Association
Cray Research, Incorporated
Dash, Straus & Goodhue
Digital Equipment Corporation
DLS Electronic Systems, Inc.
Electro-Metrics Company, Inc.
Electronic Industries Association
Elite Electronic Engineering Company
GTE Service Corporation
Hewlett-Packard Company
Hilliard, Mr. David E.
Honeywell Testing Services
Intel Personal Computer Enhancement Operation
International Business Machines Corporation
International Compliance Corp.
Japan Business Machine Makers Association

Japan Electronic Industry Development Association
Kansai Electronic Industry Development Center
Litton Systems, Incorporated
Motorola, Inc.
National Association of Broadcasters
NBI Incorporated
NCR Corporation
Racal-Milgo
Retlif Testing Laboratories
Seiko Epson Corp.
Spectrum Measurement Corporation
STB Systems, Incorporated
Tandem Computers, Inc.
Tandy Corporation
Unisys Corporation

APPENDIX A - PARTIES FILING REPLY COMMENTS TO TP-5 PROPOSAL

Accredited Standards Committee on Electromagnetic Compatibility, C63
Amador Corporation
American Council of Independent Laboratories, Inc.
American Telephone and Telegraph Company
Association of Maximum Service Telecasters
Communication Certification Laboratory
Compaq Computer Corporation
Computer and Business Equipment Manufacturers Association
Cray Research, Incorporated
Digital Equipment Corporation
GTE Service Corporation
Hewlett-Packard Company
Motorola, Inc.
NCR Corporation
Racal-Milgo
Tandy Corporation

FOOTNOTES

[1] *See Notice of Proposed Rule Making* in General Docket No. 89-44, 4 FCC Rcd 2113 (1989).

[2] ANSI C63.4-1991 is entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz."

[3] The C63 Committee, an Accredited Standards Committee on Electromagnetic Compatibility (EMC), is a voluntary standards making organization accredited by the American National Standards Institute (ANSI) with the Institute of Electrical and Electronic Engineers, Inc. (IEEE) as its secretariat. C63 consists of representatives from a wide variety of concerned industry, trade, government and professional organizations that are responsible for developing standards for measuring the interference potential of low voltage electronic devices, such as computers.

[4] *See Report and Order* in General Docket No. 80-284, 46 FR 23240 (1981) and *Memorandum Opinion and Order* in General Docket No. 80-284, 48 FR 34748 (1983).

[5] CISPR is the French acronym for the International Special Committee on Radio Interference. This Committee is a voluntary standards making organization under the auspices of the International Electrotechnical Commission which develops international recommendations for controlling the interference of various electrical and electronic devices. These recommendations are often adopted by foreign administrations as the national law for controlling interference to radio communications. For example, the European Community countries are proposing or have adopted many of the CISPR recommendations. Many non-European countries are also adopting CISPR recommendations. CISPR Publication 22-1985, "Limits and methods of measurement of radio interference characteristics of information technology equipment" may be obtained in the United States from: American National Standards Institute, 1430 Broadway, New York, NY 10018, Telephone 212642-4995. Information technology equipment (ITE) is defined as equipment designed for the purpose of: 1) receiving data from an external source, 2) performing some processing functions on the received data, or 3) providing a data output.

[6] ANSI C63.4-1988 is consistent with international standards, specifically CISPR Publication 22, but provides significantly more detail than the CISPR document.

[7] When we first considered revisions to our digital device test procedures, we were aware of C63.4-1988, but did not consider it a candidate for the new test procedure. While C63.4-1988 contains much useful information, it does not address a number of areas that are important in the testing of digital devices. For example, it does not provide adequate guidance on how to configure computer systems for emissions measurements or how to manipulate the equipment and cables during testing. Instructions on these subjects are essential in order to ensure that the results obtained in testing are repeatable. We also noted that C63.41988 does not provide for measurements above 1 GHz.

[8] The European Community (EC) or European Common Market is an group of 12 individual countries that are about to harmonize their digital device limits in accordance with EC Directives. Rather than test a device for 12 separate limits, an equipment manufacturer will only have to test a device once before marketing the product in the EC. The EC market is approximately the same size as the U.S. market.

[9] We note that several commenters suggest that the Commission harmonize not only the measurement procedures, but also the U.S. digital device emission limits with those contained in CISPR 22. The issue of harmonization of emission limits is outside the scope of the present proceeding, but we intend to take up this issue in the future.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CINCINNATI SMSA LIMITED PARTNERSHIP — File No. 10936-CL-P-B-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B in Market 592 B, Ohio RSA 8 - Clinton

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Before us is a Petition to Deny (Petition) the captioned application filed by Telephone and Data Systems, Inc. (TDS). Ameritech Mobile Communications, Inc. (Ameritech Mobile), the general partner of Cincinnati SMSA Limited Partnership[1] (Cincinnati Partnership), has filed a responsive pleading on behalf of the partnership. For the reasons set forth below, we deny the Petition.

I. BACKGROUND

2. The Commission accepted applications for Ohio 8 - Clinton from January 4 - 6, 1989. *Public Notice*, Report No. CL-88-172, (released September 30, 1988). Six wireline applicants filed for the Block B frequencies, including TDS, Ameritech Mobile, and the Chillicothe Telephone Company (Chillicothe). Chillicothe was, until January 4, 1989, partly owned (19.8%) by Ohio Bell Telephone Company (Ohio Bell), a sister company of Ameritech Mobile. Both Ohio Bell and Ameritech Mobile are wholly-owned subsidiaries of American Information Technologies Corporation (AITC). Thus, Chillicothe was an affiliate of Ameritech Mobile pursuant to 47 C.F.R. § 22.13(a)(1)(ii).

3. The lottery for this market was held December 13, 1989. Ameritech Mobile was the lottery winner. Pursuant to a settlement agreement, Ameritech Mobile then transferred its application to Cincinnati Partnership. On April 30, 1990, Cincinnati Partnership was designated the tentative selectee. *Public Notice*, Report No. CL-90-165 (released April 30, 1990).

II. CONTENTIONS

4. According to TDS, Ameritech Mobile's application, signed on December 8, 1988 and filed on January 4, 1989, did not report the existence of an Ohio Bell interest in Chillicothe, or disclose any interest in another application as required by Section 22.921(b) of the Rules.[2] TDS argues, therefore, that Ameritech Mobile's application must be dismissed because it had a cross interest in another application filed for the same market.

5. In addition, TDS argues that Ameritech Mobile and Chillicothe have violated Section 1.65 of the Commission's rules [3] because they did not report the alleged cross interest each had in the other's application. TDS argues that Ameritech Mobile omitted a matter of decisional significance and this constitutes an additional ground to dismiss the captioned application.

6. In reply, Cincinnati Partnership argues that Ameritech Mobile and Ohio Bell recognized "that before [Ameritech Mobile] filed its application . . . Ohio Bell would have to divest itself of its 19.8% interest in Chillicothe if Chillicothe intended to file an application." Response at 3. However, because the application had to be microfiched prior to January 4, 1989, Ameritech Mobile's application was signed earlier, *viz.*, on December 8, 1988. Because Ameritech Mobile planned to have Ohio Bell divest its interest in Chillicothe prior to the filing deadline, Ameritech Mobile's application reflected the prospective ownership structure as of the filing deadline, not the signature date.

7. Cincinnati Partnership further states that "[a]fter ascertaining Chillicothe intended to file an application and prior to January 3, 1989, Ohio Bell and the Greater Cleveland Foundation [a charitable organization, (hereinafter Foundation)], negotiated and entered into an agreement to transfer unconditionally Ohio Bell's entire interest in Chillicothe to the Foundation." *Id.* On January 3, 1989, the Executive Committee of Ohio Bell voted to transfer Ohio Bell's interest in Chillicothe to the Foundation. On January 4, 1989, Ohio Bell completed the transfer of its shares in Chillicothe to the Foundation. An Ameritech Mobile representative, Lois J. Reed, states by affidavit that Ameritech Mobile's application was filed between 1:30 p.m. and 2:30 p.m. on January 4, 1989.

8. Cincinnati Partnership argues that Ohio Bell had no legal or equitable interest in Chillicothe at the time Ameritech Mobile's application was filed. It argues further that Section 1.65 of the Rules "cannot be read to require an applicant to disclose every interest it ever owned in another wireline, regardless of when that interest was divested." *Response* at 5. Accordingly, Cincinnati Partnership argues, there is no violation of Sections 22.291(b)(1) or §1.65 of the Commission's rules.[4]

III. DISCUSSION

9. *Section 22. 921(b).* Applicants for a wireline cellular license are prohibited from having an interest of more than 5% in more than one publicly-traded wireline applicant in the same market. In this case, Ameritech Mobile has not violated this rule because Ohio Bell's interest in Chillicothe had been transferred to the Foundation by the time Chillicothe's and Ameritech Mobile's applications were filed. At the time Ameritech Mobile filed, it had no interest in Chillicothe's application. Therefore, Ameritech Mobile did not violate Section 22.921(b) because Chillicothe (or for that matter Ameritech Mobile) was not yet an applicant.

10. *Section 1.65*, upon which TDS relies, applies to changes after an application has been filed. Accordingly, TDS' reliance on Section 1.65 is inapposite. Ameritech Mobile's failure to report its affiliation with Chillicothe prior to filing is of no decisional significance, particularly

because the parties, as intended, executed the termination of that affiliation prior to filing the application. The primary purposes of the disclosure requirements are to ensure that no applicant has more than its fair share of a chance to be chosen through the random selection procedure, and to ensure control remains vested in the actual applicant. The purposes are met in this case because Ameritech Mobile's sister company, Ohio Bell, did not have an interest in more than one application for this market on the date of application submission, and because control of the application and licensee has never been concealed.

11. In sum, we find that TDS has failed to provide sufficient reasons to deny the captioned application. We also find that Cincinnati SSA Limited Partnership is legally, technically financially and otherwise qualified to be a Commission licensee. Furthermore, we find that grant of the pending application for Ohio 8 - Clinton would be in the public interest and promote the efficient provision of cellular services to the public.

IV. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED, That the application filed by Cincinnati SMSA Limited Partnership, File No. 10936-CL-P-B-89, IS GRANTED. Construction is not authorized to commence at any location for which a final Federal Aviation Administration determination has not been submitted and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to interference protection in any areas outside the Ohio 8 - Clinton RSA. The authorization is conditioned upon coordination with the current and future co-channel licensees in the areas outside the RSA. Cincinnati is on notice that in the event current or future MSA/RSA licensees encounter interference from any subsequent service extensions, Cincinnati will have to change frequencies in those cells or reduce 39Bu contours to eliminate any intereference.

13. IT IS FURTHER ORDERED, That the petition to deny filed by TDS, Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That all other wireline cellular applications in the Ohio RSA 8 - Clinton market ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The Cincinnati SMSA Limited Partnership is comprised of the following partners: Ameritech Mobile, 52.723% (General Partner); Cincinnati Bell Telephone Company, 45.0089%; Telespectrum, Inc. (a wholly-owned subsidiary of Centel), 1.20%; The Germantown Telephone Company, 0.825%; and Champaign Telephone Company, 0.244%.

[2] Section 22.921(b) states in pertinent part:

> (2) *Ownership interests in publicly-traded corporate applicants.* . . . No party may have an ownership interest, direct or indirect, in mutually exclusive applications filed by publicly-traded corporations for a . . . Rural Service Area, except that interests of less than five percent will not be considered.

[3] Section 1.65 states in pertinent part:

> (a) Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application. . . .

[4] Ameritech Mobile further argues that Chillicothe's application, which reflected the Ohio Bell interest, has no bearing or relevance to Cincinnati Partnership's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

RICHMOND CELLULAR TELEPHONE COMPANY — File No. 63500-90-19-SB

Notice of Apparent Liability for Forfeiture Penalty for Station KNKA350 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 59, Richmond, Virginia

ORDER

Adopted: January 25, 1991; Released: January 31, 1991

By the Chief, Mobile Services Division:

1. Richmond Cellular Telephone Company (Richmond) has filed a letter requesting recission or reduction of the $9,900.00 forfeiture imposed by the Mobile Services Division (MSD) in a "Notice of Apparent Liability for Forfeiture" (*NALF*) issued July 3, 1990.

I. BACKGROUND

2. On February 9, 1990, the Commission issued an Official Notice of Violation citing Richmond for violating Section 17.48(a) of the Commission's rules for failing to report immediately to the Federal Aviation Administration (FAA) the extinguishment of the flashing top beacon on Richmond's tower in Hanover County, Virginia, on January 25, 1990, at 6:30 p.m.

3. On July 3, 1990, the MSD issued the *NALF*, finding that an apparent violation of Section 17.48(a) of the Commission's rules had occurred for not reporting immediately to the FAA any extinguishment or improper function of any top obstruction light not corrected within 30 minutes, as observed by an FCC engineer on January 25, 1990, at 6:30 p.m. As a result, the MSD imposed a forfeiture of $9,900.00.

II. RICHMOND'S CONTENTIONS

4. Richmond admits that it violated Section 17.48(a) because it did not notify the FAA within 30 minutes that the top tower light was out. It disputes, however, that the violation was willful and repeated or that a forfeiture is justified in this situation. Richmond claims it did not consciously or deliberately fail to inform the FAA that the light was not functioning properly. According to Richmond, it reasonably assumed that the alarm indication received that day was false because false indications had been received daily for almost a month. Richmond further adds that there was no reason to believe that the tower light was not functioning properly because it relamped the tower on October 10, 1989, and the useful life was in excess of one year based upon the manufacturer's information. Additionally, Richmond states that the quarterly inspections of its towers conducted August 21 and November 20, 1989, showed the tower lighting system functioning properly. Thus, it asserts that the January 25, 1990 failure was an isolated incident. Moreover, Richmond argues that even assuming a willful violation, the circumstances were unusual and not likely to reoccur; thus, no forfeiture should be assessed or, alternatively, the forfeiture should be reduced to less than $500.00.

5. Richmond argues that the Section 17.48(a) violation was not repeated because following the January 25, 1990 telephone call it received from the FCC engineer about the outage it immediately corrected the problem. Consequently, Richmond contends the outage was remedied the day of detection and therefore can not considered a repeated violation.

III. DISCUSSION

6. After carefully reviewing the facts and Richmond's assertions, we decline to grant its request for remission or reduction of the forfeiture. A licensee is responsible for complying with Commission rules and is responsible for its own acts and omissions. *See, e.g., Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969). By Richmond's own admission: (1) it violated Section 17.48(a) and (2) it was error for Richmond to mistakenly assume the January 25, 1990 alarm to be false. Richmond's failure to properly respond to the alarm is evidence of willfulness. Furthermore, we have previously noted that

> [t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . .

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also* Section 312(f) of the Communications Act of 1934, as amended (the Act) which defines "willful." Richmond knew it was ignoring the alarm when it sounded. This is sufficient under the law to constitute willful violation.

7. Moreover, Richmond's statements indicate an unacceptable policy in response to tower light failure alarms. The FAA should be notified immediately whenever a top beacon alarm is received. *See* Section 17.48(a). The record indicates that the cell site at issue in this proceeding is usually unmanned at night. Thus, any technical failure probably could not be corrected within the 30 minutes allowed by the Commission's Part 17 rules. Under such circumstances, it is prudent that a licensee should assume that any lighting alarm is real, immediately check the site, and notify the FAA within 30 minutes of the failure. "The antenna lighting rules and licensee regulations set minimum standards which licensees are required to observe." *Athens Broadcasting Co.*, 27 FCC 2d 7, 12 (Rev. Bd. 1971). The purpose of the Commission's rules regarding lighting and marking of antenna structures is to prescribe standards for the illumination and marking of those antenna structures which might constitute a risk to air navigation and safety. *See* Section 17.1 of the Commission's rules. Commission records indicate that the Hanover tower in the proceeding before us is only 4.18 miles from Hanover County Municipal Airport (address:

604 Park Road, Ashland, Virginia 23005) and, therefore, constitutes danger to air navigation and safety. Under these circumstances, Richmond's disregard for Commission rules by ignoring the alarm was both a serious violation of the Commission's rules and willful.

8. Richmond's assertion that its violation was not repeated is immaterial. Section 503(b) of the Act, in pertinent part, refers to "[a]ny person determined by the Commission . to have willfully *or* repeatedly failed to comply substantially with the terms and conditions of any license shall be liable . . . for a forfeiture." (Emphasis supplied.) Because this language is set forth in the disjunctive, the fact that Richmond remedied the situation on the day it was detected and did not repeat it does not negate the willfulness of the violation.

9. The nature, circumstances, extent, and gravity of the prohibited violation were taken into account in setting the proposed forfeiture. *See* Section 503(b)(2)(B) of the Act. As a result, we conclude that Richmond's asserted mitigating factors are insufficient to justify remission or reduction of the forfeiture. Therefore, we uphold the $9,900.00 forfeiture.

IV. ORDERING PARAGRAPHS

10. Accordingly, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Richmond Cellular Telephone Company Inc. FORFEIT to the United States the sum of Nine Thousand Nine Hundred Dollars ($9,900.00) for the violation of Section 17.48(a) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 10209, Washington, DC 20036.

11. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act, 47 U.S.C. § 504(a).

12. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Richmond Cellular Telephone Company by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-488

In the Matter of

Amendment of Section 73.202(b), RM-7395
Table of Allotments,
FM Broadcast Stations.
(Woodsville, New Hampshire)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: January 31, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 5 FCC Rcd 6491 (1990), issued at the request of Harvest Broadcasting Services ("petitioner"), proposing the allotment of Channel 249A to Woodsville, New Hampshire, as the community's first local FM service. Comments and reply comments opposing the allotment were filed by Puffer Broadcasting, Inc., licensee of Station WYKR-AM, Wells River, Vermont, and permittee of Station WYKR-FM, Haverhill, New Hampshire. Informal comments in opposition to the allotment were also filed by Douglass P. Teschner, State Representative, New Hampshire House of Representatives. No comments were filed by the petitioner or any other party expressing a continuing interest in the proposed Woodsville allotment.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, since no such interest has been expressed, we shall dismiss the proposal to allot Channel 249A to Woodsville, New Hampshire. *See, e.g., Joshua Tree, California*, 54 FR 18557, May 1, 1989, *Senatobia, Mississippi*, 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix to the *Notice*. In light of this action, we need not discuss the comments of Puffer Broadcasting, Inc. or Mr. Teschner.

3. Accordingly, IT IS ORDERED, That the petition of Harvest Broadcasting Services (RM-7395), requesting the allotment of Channel 249A to Woodsville, New Hampshire, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
January 24, 1991

Released: January 25, 1991

Mr. Peter Branton 8310-HTS
1007 Scenic Highway C11-515
Lookout Mountain, TN 37350

Dear Mr. Branton:

This letter concerns your November 17, 1989, Petition for Reconsideration of the Mass Media Bureau's October 26, 1989, dismissal of your complaint against National Public Radio. That request is being treated as an Application for Review pursuant to Section 1.115 of the Commission's Rules, given your expressed desire for eventual full Commission review. Your complaint alleged that a segment about John Gotti, a reputed organized crime figure, broadcast February 8, 1989, at 6:25 p.m. on the National Public Radio program "All Things Considered," was indecent. Specifically, the recording you supplied included, as part of a news segment about organized crime, a wiretap of a telephone conversation in which Gotti repeatedly used variations of the expletive "fuck" (transcript attached). In your Petition, you claim that it is difficult to understand how the language in the broadcast can be considered less than in violation of any standards of "obscene or indecent material." You also state the broadcast contained a preliminary admission that the language is "extremely profane" and note that an "obscene word" was repeated numerous times in the broadcast.

"Indecent programming" is defined as programming "that describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987), *aff'd in part and remanded in part sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). When analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented -- a review that encompasses a host of variables, including, among other things, an assessment of whether the language was used in a "shocking" or "vulgar" fashion or was without merit. *Id.* at 932. No terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances. *Id.* at 932 and n.28; *see also* Letter from James C. McKinney to William J. Byrnes (June 5, 1987), *aff'd Memorandum Opinion and Order*, FCC 87-215 (June 16, 1987).

We recognize that the repetitious use of coarse words is objectionable to many persons, and understand that you personally may have been offended by the use of expletives during the Gotti segment. Nonetheless, we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise "patently offensive," as that term is used in our indecency definition. In reaching this determination, we note that the program segment, when considered in context, was an integral part of a *bona fide* news story concerning organized crime, and that the material prompting your complaint was evidence used in a widely reported trial. *See Infinity Broadcasting*, 3 FCC Rcd at n.31. These surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency. In reaching this conclusion, we note that we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners. *See, e.g., Syracuse Peace Council*, 2 FCC Rcd 5043, 5051 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 107 L. Ed. 2d 737 (1990).

Based on the foregoing, we affirm the Mass Media Bureau's conclusion that the material in question was not indecent. Accordingly, pursuant to Section 1.115 of the Commission's Rules (47 C.F.R. Section 1.115) your Request for Reconsideration of the October 26, 1989, determination, which the Bureau has referred to the Commission to be treated as an Application for Review, IS DENIED.

This letter was adopted by the Commission on January 24, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENT

February 8, 1989, 6:25 p.m.
"All Things Considered" #890208 "GOTTI"

MV: Male Voice
MS: Mike Schuster
JG: John Gotti
OV: Other Voice

MV: He is known in New York as the dapper Don and the book published last year labeled him a Mob Star. John Gotti has become the nation's most notorious gangster. In recent years he's been acquitted in two celebrated trials and now he's facing new charges in connection with an attempted killing of a labor official. Through it all, John Gotti has become a familiar face on television and a feared presence on the streets of New York. NPR's Mike Schuster has a report and a warning, the following story contains some very rough language.

* * * * *

MS: This is an excerpt from a wiretap. One conversation Gotti had with an associate some years ago before heading the Gambino family. The tape has been played in court. Gotti is browbeating the associate for not returning

his phone calls. The other man claims his wife didn't pass along Gotti's messages. Gotti's threats are extremely profane.

JG: (Unintelligible) fucking (unintelligible) you understand me?

OV: (Unintelligible)

JG: Listen, I called your fucking house five times yesterday. Now if you want (unintelligible) fuck (unintelligible) Now if you want to disregard my fucking phone calls I'll blow you and the fucking house up.

OV: I never disregarded anything.

JG: Are you, call your fucking wife or will you tell her.

OV: All right.

JG: This is not a fucking game I (unintelligible) how to reach me days and nights here, my fucking time is valuable.

OV: I know that.

JG: Now you get your fucking ass (unintelligible) and see me tomorrow.

OV: I'm going to be here all day tomorrow.

JG: Never mind all day tomorrow (unintelligible) if I hear anybody else calling you (unintelligible) I'll fucking kill you.

MS: As head of the Gambino family, Gotti controlled vast crime activities including gambling, loan sharking, labor racketeering and gasoline bootlegging. Author Gene Mustane says Gotti has worked hard during the past three years to consolidate his control and defend the mob from the onslaught of federal and state prosecutions that the Mafia suffered.

DISSENTING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Application for Review of Bureau's Dismissal of Indecency Complaint Filed Against National Public Radio's "All Things Considered".

Between 1975 and 1987, the Commission took a somewhat limited approach to enforcing its prohibition against indecent broadcasts. It took no action unless the material involved the repeated use, for shock value, of words similar or identical to the so-called "Seven Dirty Words" satirized in George Carlin's "Filthy Words" monologue---a performance involved in the Supreme Court's *Pacifica* decision. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

Four years ago, the Commission found that this standard was unduly narrow. It concluded that the definition of indecent material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in that case. As we noted in *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987), "[t]hose particular words are more correctly treated as examples of, rather than a definitive list of the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable for the broadcast medium, constitute indecency." The D.C. Circuit upheld this Commission action, finding that the FCC had "rationally determined that its former policy could yield anomalous, even arbitrary results." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338 (D.C. Cir. 1988). In broadening its definition of indecency, however, the Commission never abandoned its earlier standard. The seven dirty words remained a key determinant of what the Commission would find unacceptable. The Commission, by its 1987 clarification, merely expanded the standard to include a wider range of indecent material.

In this case, however, it appears that the Commission is veering away from its former standard. Bending over backwards, perhaps--- because the broadcast in question was by National Public Radio, and because it was a newscast--- the Commission suddenly appears willing to ignore the standard that in the past has guided its decisions on indecency. One stark fact remains, however: the broadcast featured, in the course of a few seconds, ten repetitions of the dirtiest of "the seven dirty words". The word in question is the one expletive that has traditionally been considered the most objectionable, the most forbidden, and the most patently offensive to civilized and cultivated people: the famous F-word. That word, in the past---and especially its deliberate, repeated, gratuitous use--- has almost always been sufficient to justify a ruling of indecency by the FCC.

Can its use in the NPR broadcast now before us be defended as necessary to inform the audience and to establish the character of John Gotti, the man who spoke it? Perhaps. Just one airing of the word, however, would be sufficient to accomplish that purpose. Although I recognize the importance of context to indecency determinations, I consider that the deliberate and repeated use of this word fits precisely the meaning of the word gratuitous: unnecessary and unwarranted. And such deliberate and repeated use, in my judgment, however noble the intent of the broadcaster, seems to me to fit the definition of pandering: catering to low tastes.

In the sensitive and controverted field of indecency enforcement, every Commission decision, however small or close, has precedential value. I am concerned that the Commission's departure here from its usual standard, though well-intentioned, could open the floodgates to the repeated, gratuitous use of language that has historically and legally been considered indecent or obscene. By such decisions as this, the Commission may unwittingly encourage a plethora of "newscasts" that purvey patently objectionable material under the cover of journalistic legitimacy. Such a development would not only be a misfortune for our national culture; it would also contravene the intentions of Congress and the courts, who have never suggested that broadcasters be given *carte blanche* to incorporate indecent material into news or public affairs programming.[1] Although the Commission has twice declined to adopt an express "news exemption" for indecency enforcement, it may have implicitly created such an exemption here.

The Supreme Court has held that government can constitutionally regulate indecent broadcasts in the interest of protecting children. I interpret this as including the protection of children from the gratuitous use of patently offensive language even in *bona fide* news stories. And so I dissent, in this case, from the Commission's decision that the broadcast in question was not indecent.

FOOTNOTE FOR STATEMENT

[1] *See Citizen's Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976); *Infinity Broadcasting Corp. of Pa.*, 3 FCC Rcd 930, 937 n.31 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE AND WIRELESS COMMUNICATIONS, INC.

File Nos. I-T-C-90-194
I-T-C-91-025

Applications for authority to resell the services of other common carriers to provide switched voice service to specific international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 25, 1991; Released: February 1, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed on September 24 and November 6, 1990, and amended on January 22, 1991, by Cable and Wireless Communications, Inc. (C&W), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services set forth in AT&T's Tariff FCC No. 1, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 for the provision of international switched voice service between the U.S. and 15 additional points. The applications were placed on public notice on October 4 and November 15, 1990, respectively. No comments were received.

2. C&W is a common carrier authorized to provide switched voice services on a resale basis to numerous international points. C&W is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As a result, C&W is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points.

3. As a dominant carrier in its provision of international common carrier services, C&W remains subject to traditional entry and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorization must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorizations, or, as here, serve additional points set forth in the underlying carriers' tariffs but not specified in the reseller's existing Section 214 authorizations.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by C&W between the United States and the points listed in Appendix A to this decision.

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-194 and I-T-C-91-025 ARE GRANTED, and C&W is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the points listed in the Appendix A.

6. IT IS FURTHER ORDERED that C&W shall file copies of any operating agreements entered into by itself or its parent/affiliate with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that C&W shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries C&W is authorized to serve within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that C&W shall file annual traffic and revenue reports as provided in Section 43.81 of the Commission's Rules, 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Albania
Bhutan
Burkina Faso
Congo
Cook Islands
Djibouti
Mali Republic
Mauritania
Mayotte
Mozambique
Reunion Island
Sierra Leone
Solomon Islands
Syria
Western Samoa

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG
DISTANCE CORPORATION,
Complainant,

v. File No. E-89-358

THE MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 25, 1991; Released: February 1, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 19, 1989, Access Long Distance Corporation, (hereinafter "Access") filed the above-captioned formal complaint against The Mountain States Telephone & Telegraph Company (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access charges for the period January 1, 1987 through December 31, 1987. On November 27, 1989, however, Access filed a motion for leave to withdraw the complaint without prejudice because the complaint is based on a one-year monitoring period.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Access' Motion for Leave to Withdraw Complaint IS GRANTED and that the above captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-110

In re Applications of

EMPIRE STATE BROADCASTING CORPORATION (WWKB)
Buffalo, New York

File No. BR-840201WQ

For Renewal of License

BURSAM COMMUNICATIONS CORPORATION (WTHE)
Mineola, New York

File No. BP-840430AC

ERRATUM

Released: February 1, 1991

Memorandum Opinion and Order, FCC 91-19, released January 25, 1991 in the above captioned proceeding is corrected to reflect the proper adoption date as January 10, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-4

In the Matter of

Reexamination of the Effective
Competition Standard for the
Regulation of Cable Television
Basic Service Rates

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: January 25, 1991; Released: January 25, 1991

By the Chief, Mass Media Bureau:

1. On December 13, 1990, the Commission adopted a *Further Notice of Proposed Rule Making* (*Further Notice*) in this proceeding, 56 FR 406 (January 4, 1991), proposing to revise its rules for determining whether a cable system is subject to effective competition and thus exempt from rate regulation of basic cable service by its local franchising authority. The *Further Notice* also seeks comment on proposals regarding the standards for rate regulation in situations where effective competition does not exist. Comments are currently due on January 31, 1991, and reply comments are due on February 15, 1991.

2. On January 18, 1991, the National Association of Broadcasters (NAB) and the Association of Independent Television Stations, Inc. (INTV), submitted a joint motion to extend the date for filing comments to February 14, 1991 and the date for filing reply comments to March 1, 1991. NAB and INTV state that the *Further Notice* includes several new proposals for determining when cable systems can be deemed to face effective competition, such as a penetration factor and a behavioral test. They also observe that the *Further Notice* seeks comment on the relationship of must carry rules to the balance Congress sought to establish in the Cable Communications Policy Act of 1984, an issue not previously raised in this proceeding. Moreover, NAB notes that its position on these issues cannot be finalized until the conclusion of its Television Board's winter meeting, which will be one day before the present due date for comments. For these reasons, NAB and INTV seek an extension of time to ensure fully considered responses to the proposals.

3. The *Further Notice* comment filing dates reflect the Commission's interest in resolving the matters raised in a prompt fashion. However, we recognize the significance of our rules in this area for cable subscribers, cable system operators, and other participants in the market and that new and important issues relating to matters of interest to broadcasters have been raised. Accordingly, in view of the interest in developing a complete record in this proceeding, and the likelihood that a brief delay in filing comments may ultimately expedite a sound resolution of this proceeding, the filing dates for comments and reply comments will be extended as requested.

4. Accordingly, IT IS ORDERED that the dates for filing comments and reply comments in response to the above referenced *Further Notice of Proposed Rule Making* ARE EXTENDED to February 14, 1991, and March 1, 1991, respectively. This action is taken pursuant to authority provided in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

5. For further information concerning this proceeding, contact Marcia Glauberman, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-513

In the Matter of

Amendment of Section 73.202(b), RM-7388
Table of Allotments,
FM Broadcast Stations.
(Campbell, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6547 (1990), proposing the substitution of FM Channel 298C3 for Channel 298A at Campbell, Missouri, and modification of the construction permit for Station KKJJ, Channel 298A, accordingly. The *Notice* was issued in response to a petition filed by Jack G. Hunt ("petitioner"). Petitioner filed comments restating his interest in Channel 298C3. No other comments were received.

2. We believe the public interest would be served by substituting Channel 298C3 for Channel 298A at Campbell in order to provide the community with a wide area FM broadcast service. As indicated in the *Notice*, Channel 298C3 can be allotted to Campbell consistent with the Commission's spacing requirements at petitioner's specified site.[1] We will authorize a modification of petitioner's construction permit for Station KKJJ, Channel 298A, Campbell, to specify operation on Channel 298C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Campbell, Missouri	298C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KKJJ, Channel 298A, Campbell, Missouri, IS MODIFIED to specify operation on Channel 298C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 298C3 at Campbell are 36-29-42 and 89-51-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-470

In the Matter of

Amendment of Section 73.202(b), RM-7374
Table of Allotments,
FM Broadcast Stations.
(Laurel, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6276 (1990), issued in response to a petition filed by Jubilee Radio Network of Montana ("petitioner"). The *Notice* proposed the allotment of FM Channel 269C to Laurel Montana, as that community's first FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 269C to Laurel, Montana, since it could provide the community with its first FM broadcast service. Channel 269C can be allotted to Laurel in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Laurel, Montana	269C

4. The window period for filing applications for Channel 269C at Laurel will open on **March 19, 1991,** and close on **April 18, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 269C are 45-40-24 and 108-46-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-487

In the Matter of

Amendment of Section 73.202(b),	RM-7390
Table of Allotments,	
FM Broadcast Stations.	
(Tishomingo, Oklahoma)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. At the request of Ballard Broadcasting Company of Oklahoma, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6449 (1990), proposing the substitution of Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, and the modification of its construction permit for Station KTSH-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 259C3 for Channel 292A at Tishomingo, Oklahoma, since it could provide the community with a wider coverage area FM service. No other party expressed an interest in use of the channel at Tishomingo. Therefore, in accordance with Section 1.420(g) of the Commission's Rules, we will modify petitioner's construction permit for Station KTSH-FM to specify operation on non-adjacent Channel 259C3. Channel 259C3 can be allotted to Tishomingo in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KTSH-FM's construction permit.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tishomingo, Oklahoma	259C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Ballard Broadcasting Company of Oklahoma, Inc., for Station KTSH-FM, Tishomingo, Oklahoma, IS MODIFIED to specify operation on Channel 259C3, in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 259C3 at Tishomingo are North Latitude 34-11-15 and West Longitude 96-43-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-441

In the Matter of

Amendment of Section 73.202(b), RM-7210
Table of Allotments,
FM Broadcast Stations.
(Grand Rapids, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 1, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5921 (1990), issued in response to a petition filed by Haith Broadcasting Corporation ("petitioner"), proposing the substitution of Channel 254A for Channel 255A at Grand Rapids, Michigan. Petitioner also requests modification of its construction permit for Station WXJI, Channel 255A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirms its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 254A for Channel 255A at Grand Rapids, Michigan, since it would allow Station WXJI to increase its operation from three to six kilowatts.[1] The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we are modifying petitioner's construction permit for Station WXJI, Channel 255A, Grand Rapids, Michigan, to specify operation on Channel 254A. Since Grand Rapids is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Grand Rapids, Michigan	229B, 239B, 245B, 250B, 254A, 267B, 275B, 281B, 289B

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit of Station WXJI, Grand Rapids, Michigan, IS MODIFIED to specify operation on Channel 254A in lieu of Channel 255A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WXJI's construction permit, BPH-860507PT, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with construction permit BPH-860507PT, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] *See* MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[2] The coordinates for Channel 254A are 43-01-36 and 85-41-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-566

In the Matter of

Amendment of Parts 2 and 90 of the Commission's Rules to Provide for Stolen Vehicle Recovery Systems — RM-6362

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 20, 1990; Released: February 4, 1991

By the Commission:

1. By this action, the Commission clarifies certain aspects of its *Report and Order* in the above-captioned proceeding in response to two petitions for reconsideration and clarification.[1] The Commission declines to develop or adopt compatibility and protocol standards at this time. Further, it concludes that tracking of suspected stolen vehicles prior to the filing of the stolen vehicle report is not general purpose vehicle tracking or monitoring and, therefore, is permitted. Additionally, the Commission prohibits mobile transmitters installed in vehicles from automatically activating as part of an "anti-jamming" feature.

BACKGROUND

2. On September 29, 1989, the Commission adopted the *Report and Order* in this proceeding, which allocated the frequency 173.075 MHz nationwide on a Government/non-Government shared primary basis for stolen vehicle recovery systems (SVRSs). The Commission specifically limited SVRSs to recovering stolen vehicles and prohibited general purpose vehicle tracking or monitoring. The Commission declined to establish a joint Government/industry committee that would develop compatibility and protocol standards for SVRSs. The *Report and Order* noted that public safety interests had not expressed a need for such standards and that the development of standards could stifle this relatively new technology. The Commission also expressed concern that the process of establishing standards would significantly delay the introduction of this service.

3. On November 24, 1989, the Commission received petitions for reconsideration of the *Report and Order* from Vehicle Security Electronics, Inc. (VSE) and METS, Inc. (METS). Both VSE and METS request that the Commission reconsider establishing a joint Government/industry committee that would develop compatibility and protocol standards for SVRSs. METS also seeks clarification of whether our rules would permit a feature of its system which allows tracking of a subscriber's vehicle that is suspected of being stolen prior to the filing of the stolen vehicle report. Finally, VSE requests that the Commission prohibit an "anti-jamming" feature for mobile units which provides for their activation when they fail to receive a periodic polling signal from the licensee's base station during any 24-hour period. The Commission received an opposition to the petitions for reconsideration from Lo-Jack and a statement from the Association of Maximum Service Telecasters (MST) supporting VSE's concerns regarding the "anti-jamming" feature. METS replied to Lo-Jack's opposition.

DISCUSSION AND DECISION

Compatibility and Protocol Standards

4. Both VSE and METS ask that the Commission reconsider its decision not to establish compatibility and protocol standards. VSE requests that the Commission develop a uniform transmission protocol (based on the Lo-Jack system, if applicable) that would mandate compatibility between SVRSs.[2] METS states that a joint Government/industry committee charged with developing inter-system standards is required to prevent a monopoly from developing. Also, it claims that the operation of multiple, incompatible SVRSs is beyond the means of most Police Radio Service licensees. METS advocates the adoption of an "open-architecture" environment in which competing vendors' systems are interoperable in order to permit smooth inter-system and inter-jurisdictional functioning. METS believes that the SVRS vendors could arrive at a basic set of standards that would result in little, if any, delay in the deployment of SVRSs.[3]

5. Lo-Jack opposes the establishment of a joint committee for the establishment of SVRS standards if it means that the service must revert to experimental status in the meantime. With respect to the monopoly issue, Lo-Jack assures the Commission that all of its agreements with licensees are non-exclusive and permit the law enforcement agencies to contract with other SVRS providers.

6. *Decision.* In the *Report and Order*, we concluded that mandated standards were unnecessary. The petitioners have not presented us with sufficient reason for altering this conclusion. We continue to believe that, if the Commission were to develop standards, there would be a significant delay before SVRSs could be implemented and during that time the public would be denied this service. Past experience shows that developing such standards generally requires several years. Further, any standards ultimately established could limit future technological improvements. Moreover, we note that public safety interests, the only entities permitted to hold SVRS licenses, have expressed very little interest in standards. Nevertheless, if they now believe some voluntary standards are needed, then we invite the public safety community and industry to develop industry standards.

7. We further find that no evidence exists to demonstrate that Lo-Jack is establishing, or is likely to establish, a monopoly in this service because of a lack of standards. The SVRS rules permit multiple systems to be established in any given area, and the petitioners have not demonstrated that local law enforcement officials are unwilling to consider systems other than Lo-Jack's or even multiple systems. Indeed, the City of Los Angeles has indicated that it will consider using multiple systems.[4] Moreover, there are alternative systems to those that operate pursuant to this part of the Commission's Rules. North American Teletrac and Location Technology, Inc.,

doing business as PACTEL Teletrac, Joint Venture, is manufacturing and selling a SVRS that operates in the 902-928 MHz band; in fact, one of its systems is being used in Los Angeles where a system using Lo-Jack technology is also operating. In addition, future satellite systems may be able to perform similar functions.[5] In view of the foregoing, we continue to believe that mandated standards are unnecessary. We note, however, that we would be prepared to revisit this issue if experience demonstrates that the absence of uniform standards is seriously impeding competition in this industry or is impairing the effectiveness of stolen vehicle recovery systems.

Tracking Mobiles

8. METS requests clarification on whether a feature of its system that permits a subscriber's vehicle to be tracked prior to the filing of a stolen vehicle report is permissible under Section 90.19(f)(7) of the rules.[6] It explains that the transmitting unit installed in the vehicle of a METS system subscriber automatically begins signaling within 30 seconds from the moment that the vehicle has been entered and the transmitting unit has not been disarmed. The police are alerted after METS has verified with the subscriber that the vehicle is stolen. This feature, according to METS, provides a chronology of the vehicle's whereabouts from the moment of unauthorized entry. Due to the early activation of the system, METS believes that there is a better chance of apprehending the thief and a reduced risk of property damage to the stolen vehicle.

9. Lo-Jack opposes the idea of initial activation and tracking by a private system as espoused by METS. Lo-Jack believes that SVRSs should be activated only by the law enforcement agency with responsibility for the system. Lo-Jack considers the METS system to be of a general tracking nature and, thus, not within the rules.

10. *Decision*. The Commission specifically prohibited SVRSs from general tracking and monitoring in the *Report and Order*.[7] As METS' system is activated upon the reasonable likelihood of a theft, the Commission does not consider this to be general tracking. The Commission recognizes that such systems could provide for a number of false alarms and that the police may be concerned, if that should indeed occur. However, the police, as the licensee of the system, are responsible for its operation and can preclude such activity if problems arise. We find that the tracking of an alleged stolen vehicle prior to the police being notified of the theft is permitted under our interpretation of Section 90.19(f)(7) of the rules. However, we emphasize that this does not permit general tracking and that there must be some reasonable belief that a theft has likely occurred.

Activation of Mobile Units When Out of Base Station Range

11. VSE is concerned with the interference caused by mobile transmitters from one system when they self-activate in the service area of another system. Of particular concern to VSE is the Lo-Jack system where a transponder hidden in the vehicle automatically begins transmitting whenever the mobile unit has not received a signal from its Sector Activation System within 24 hours. VSE argues that the interference from these self-activated transmitters would cause serious system failure or performance degradation in areas served by other systems. Further, it argues that situations could arise where innocent commuters and vacationers are stopped by the police or where a flood of false alarms could disrupt law enforcement activities. Furthermore, VSE is concerned that interference to other systems on these frequencies may result in public safety agencies choosing the Lo-Jack system regardless of the price or performance of other competitive systems. Specifically, VSE asks that the rules prohibit the transmission of mobile transmitter signals not activated by a base station. MST also expresses concern that the automatic activation feature might interfere with the reception of a nearby television channel seven signal.

12. Lo-Jack replies that VSE raises an unrealistic concern regarding self-activation as the rules limit a mobile's transmitter output to 2.5 watts. Also, self-activation occurs only after the mobile transmitter has not received a signal from a base station in 24 hours. This "anti-jamming" feature prevents the thief from transmitting a blocking signal that would prevent the mobile transmitter from answering a polling query. Finally, Lo-Jack believes that the number of vehicles that are likely to leave their service area for an extended period of time is insufficient to cause significant problems for other SVRSs. In any event, Lo-Jack indicates that it can easily terminate this feature of its system by a simple signal from the base station(s) to the mobile units.[8]

13. *Decision*. We believe that this "anti-jamming" feature may cause interference to non-Lo-Jack systems. In today's mobile society, it is very likely that a substantial number of vehicles may leave their home service areas and potentially cause interference to neighboring systems. As an example, Los Angeles and Las Vegas police may choose different vendors and many residents from Los Angeles frequently visit Las Vegas. Moreover, the local police will have no control over mobile units from outside their jurisdiction, and they will not be able to easily correct such problems. The potential for interference to other systems from mobile units automatically activated outside of their own jurisdiction is of great concern to the Commission. Specifically, we find that the benefits of the Lo-Jack "anti-jamming" feature are outweighed by the threat of interference and we are prohibiting such activity. Further, the rules adopted in the *Report and Order* do not envision the activation of mobile units outside of their service area(s). By this action, we are not banning "anti-jamming" features in general--just the automatic activation of mobile units outside the SVRS's jurisdiction.

ADMINISTRATIVE

14. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, and 303(r), the petitions for reconsideration and clarification filed by METS, Inc. and Vehicle Security Electronics, Inc. ARE GRANTED to the extent indicated herein, and otherwise ARE DENIED. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Report and Order*, GEN Docket No. 88-566, 4 FCC Rcd 7558 (1989).

[2] *See Petition for Reconsideration* filed by VSE on November 24, 1989, p 5.

[3] *See Petition for Partial Reconsideration and for Clarification* filed by METS on November 24, 1989, pp 2-11.

[4] *See* letter, dated February 24, 1989, to President of METS from Chairman of SVRN Evaluation Panel of Los Angeles Police Department.

[5] Both Geostar Corporation and QUALCOMM, Inc. are authorized to provide this service. STARSYS, Inc. and Orbital Communications Corporation have also asked for such authority. *See Petition for Rule Making* filed by STARSYS, Inc., received on May 4, 1990. *See Petition for Rulemaking* filed by Orbital Communications Corporation, received on February 28, 1990.

[6] 47 CFR Section 90.19(f)(7).

[7] The allocation was limited to SVRS activities to provide a frequency that would be free of interference from other police operations including general tracking and monitoring of vehicles.

[8] *See Opposition to Motions for Reconsideration* filed by LoJack, received on January 9, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-396

In re Applications of:

KQED, INC.
San Francisco, California

For renewal of licenses of
noncommercial stations

KQED-FM	File Nos. BRED-237, BRED-800801ZS and BRED-830801WD
KQED-TV, and	File Nos. BRET-25, BRET-800801LQ and BRET-830801LK
KQEC(TV)	File Nos. BRET-203 and BRET-800801LV

KQED, INC. San Francisco, California	**MM DOCKET NO. 84-567** File No. BRET-830801LJ

For renewal of license of
noncommercial educational
station KQEC(TV), Channel 32,
San Francisco, California

MINORITY TELEVISION PROJECT San Francisco, California	**MM DOCKET NO. 84-568** File No. BPET-831101KI

For a construction permit for a
new noncommercial educational
television station on Channel 32,
San Francisco, California

MEMORANDUM OPINION AND ORDER

Adopted: January 4, 1991; Released: February 1, 1991

By the Commission:

1. The Commission has before it an order upholding a Review Board decision, which (1) denied KQED, Inc. renewal of station KQEC(TV), channel 32, San Francisco, California; (2) renewed KQED's licenses for KQED-TV, channel 9, San Francisco, California, and KQED-FM, San Francisco, California; and (3) granted Minority Television Project Inc.'s (MTP) application for a construction permit for the facilities of KQEC(TV). *KQED, Inc.*, 5 FCC Rcd 1784 (1990). The Commission agreed with the Board that KQED committed serious misconduct by lacking candor about and misrepresenting the reasons for deactivating KQEC(TV) beginning in January 1980. The Commission found that KQED's board of directors adopted a resolution authorizing the deactivation of channel 32 as a means of alleviating KQED's financial problems. However, KQED's notifications to the Commission about the status of the station did not mention the board's budgetary action. Instead, KQED stated that the station had been shut down for technical reasons associated with the replacement of switcher equipment. KQED followed this approach knowing that the Commission had previously expressed disapproval of prior action by KQED deactivating channel 32 for budgetary reasons. 5 FCC Rcd at 1784-85 ¶¶ 3-4. Because the Commission found that KQED committed serous misconduct, it denied renewal of KQEC(TV). However, the Commission renewed the licenses of co-owned stations KQED-TV and KQED-FM because it considered the loss of a single station an appropriate sanction on the record presented and an adequate deterrent of future misconduct. *Id.* at 1785 ¶ 7. The Commission also agreed with the Board that MTP should not be required at this time to make a further showing that it is financially qualified to construct and operate its proposed station. *Id.* at 1785 ¶ 10.

2. The California Public Broadcasting Forum et al. (Forum), which filed a petition to deny against KQED, and MTP seek reconsideration of the Commission's order.[1] Each asserts that new circumstances warrant different action by the Commission. We conclude that both petitions are without merit, and we deny them.

I. FORUM'S PETITION

3. Forum asserts that the Commission should have denied renewal of all three of KQED's stations, rather than only of KQEC(TV). Forum observes that KQED's management recently approved a plan to use channel 32 to establish a 24 hour a day news channel to be carried on Bay Area cable systems, in collaboration with a commercial broadcaster. According to Forum, KQED intends that this plan should impose no cost on KQED and would be effectuated (on cable) even if its license for channel 32 were ultimately denied.

4. In Forum's view, this plan confirms that channel 32 has no real economic value to KQED. Forum contends that KQED does not use channel 32 for fundraising and that channel 32 is a burden rather than a source of revenue. Forum asserts that KQED's budget has no separate line item for KQEC(TV). Thus, Forum contends that the loss of channel 32 -- KQED's least important station -- will not have a significant deterrent impact of KQED.

5. Additionally, Forum contends that because KQED's lack of candor and misrepresentations reflect on KQED's trustworthiness, the Commission cannot rely on KQED to be the licensee of other stations, especially when they are co-located and co-managed. Forum maintains that KQED's serious misrepresentations were pervasive and continuing and were made by top management. Forum asserts that KQED's misconduct cannot be mitigated by evidence of meritorious programming.

6. KQED responds that KQEC(TV) is a valuable broadcast property in which KQED has made substantial investments to further its public broadcasting mission. KQED also submits that the loss of KQEC(TV) has had a psychological impact on its personnel and has tarnished KQED's reputation with the public and the public broadcasting community. Hence, KQED contends that the loss of KQEC(TV) has already had substantial deterrent impact. KQED pledges to make every effort to avoid "any circumstances that might make it vulnerable to even the suggestion of untruthfulness in its relationship with the FCC." Opposition at 8. According to KQED, the loss of further licenses would harm the public by depriving it of a valuable service, and Forum's efforts to this end represent mere vindictiveness. Additionally, KQED points out that, in several past cases, the Commission has denied renewal of only one of a multiple owner's licenses.

7. The Mass Media Bureau agrees with KQED that KQED's apparent willingness to convert KQEC(TV) to an all-news format does not support the argument that its loss has no detrimental effect. The Bureau contends that the loss of channel 32 sends a clear message to broadcasters, including KQED. The Bureau also agrees that the decision to deny only a single station is a valid exercise of the Commission's discretion.

8. Forum replies that KQED's investment in channel 32 has been minimal and that KQED's main concern has been to relieve itself of the operating costs of KQEC(TV). Forum asserts that KQED remains unrepentant and untrustworthy. According to Forum, KQED is the subject of much local criticism and only by totally disqualifying KQED will San Francisco have the opportunity to be served by a noncommercial broadcaster operating in the public interest.

9. We adhere to our judgment that the loss of KQEC(TV) represents a substantial deterrent. The record indicates that over the years KQED has used channel 32 to complement the programming presented on channel 9, especially with regard to instructional and minority-oriented programming to provide unique service to the Bay Area. *See KQED, Inc.*, 2 FCC Rcd 352, 364-67 ¶¶ 120-40 (I.D. 1987). This performance illustrates that channel 32 has value to KQED, although, as the record also shows, KQED has not always given high priority to channel 32's operations. KQED's apparent intention to install an all-news format on KQEC(TV) does not on its face undercut the inference that the station is an important outlet for programming. Moreover, it is highly likely that the loss of a broadcast license will be seen by both the licensee and others as a serious matter.

10. In view of this deterrent impact, we continue to believe that the loss of KQEC(TV) alone represents an appropriate sanction in this case. Although KQED's misconduct was serious, it was limited in its context and did not pervade the operation of the three stations. Hence, this case differs from those egregious cases in which pervasive and continuing misconduct renders a licensee categorically unfit to hold any license. *See Faulkner Radio, Inc.*, 88 FCC 2d 612, 616-17 ¶¶ 12-13 (1981), and cases cited therein. It is, rather, a case in which the loss of a single station can be expected to deter KQED and other licensees from further misconduct. *See Character Qualifications*, 102 FCC 2d 1179, 1228 ¶ 103 (1986), *recon. denied*, 1 FCC Rcd 421 (1986). Nonetheless, as we previously stated, although the denial of KQED's other licenses is unwarranted on this record, we expect KQED to take whatever steps are necessary to ensure that no further misconduct occurs. 5 FCC Rcd at 1785 ¶ 7. In this regard, we will carefully scrutinize any indication that further misconduct has occurred in the operation of those stations.

II. MTP'S PETITION

11. MTP reports (without providing a sworn statement or details) that KQED refuses to turn over assets related to KQEC(TV) to MTP. MTP requests the Commission to require KQED to relinquish the transmitter system, programming rights, subscriber lists, pledges, underwriting agreements, accounts receivable, and cash associated with channel 32. MTP asserts that the Commission has the authority to compel KQED to turn over its assets based on the Commission's authority to regulate noncommercial broadcasting. In MTP's view, KQED has no right to retain these assets -- which MTP claims were obtained through public funds -- after the loss of the license for channel 32. Additionally, MTP maintains that KQED should not be allowed to retaliate against MTP by withholding these assets, thereby disrupting the institution of new service on channel 32, contrary to the public interest. Relying on *Alabama Citizens for Responsive Public Television, Inc.*, 69 FCC 2d 1061, 1070-71 ¶ 24 (1978), MTP contends that a licensee's willful attempts to obstruct the institution of new service by a challenger reflects adversely on the licensee's basic qualifications.

12. KQED and the Bureau respond that the Commission has no policy of requiring an incumbent to relinquish its assets to a challenger and that KQED has no obligation to do so. KQED explains that it will use the assets in question in connection with its continuing service on its remaining stations. KQED denies that it has attempted to obstruct MTP's efforts to obtain a transmitter site. In KQED's view, MTP's request merely confirms the inadequacy of MTP's own resources for constructing and initially operating the station.

13. We agree with KQED and the Bureau that MTP's request has no basis in Commission policy. We have disclaimed authority to require an incumbent even to sell or lease its facilities to a challenger, let alone to give its facilities away. *George E. Cameron Jr. Communications*, 71 FCC 2d 460, 467 ¶ 15 (1979). A station's equipment and program-related assets represent a vested property interest, which can be mortgaged or otherwise disposed of by the station's owner. *See Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 390-91 (6th Cir. 1986); *Kirk Merkley*, 94 FCC 2d 829, 830-31 ¶ 3 (1983). To the extent that MTP argues that KQED's status as a nonprofit corporation creates an obligation for KQED to dispose of its assets in the manner MTP suggests, MTP raises a question of property law more appropriately within the jurisdiction of the civil courts. *Cf. Listener's Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (the Commission defers to the courts with respect to private law disputes).[2]

III. ORDERS

14. ACCORDINGLY, IT IS ORDERED, That, good cause having been shown, Forum's Motion for Acceptance of Superseding pleading filed April 23, 1990, and Forum's Motion for Acceptance of Table of Contents and Summary filed May 18, 1990 ARE GRANTED.

15. IT IS FURTHER ORDERED, That the Petition for Reconsideration of California Public Broadcasting forum et al. filed April 23, 1990, and the Petition for Reconsideration filed April 23, 1990 by Minority Television Project, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Before the Commission are: (1) a Petition for Reconsideration filed April 23, 1990 by Forum, an opposition filed May 8, 1990 by KQED, and a reply filed May 18, 1990 by Forum; and (2) a Petition for Reconsideration filed April 23, 1990 by MTP, and an opposition filed May 8, 1990 by KQED. The Mass Media Bureau filed a consolidated opposition to both petitions for reconsideration on May 3, 1990. Forum also filed two procedural pleadings, which cure defects in its petition: (1) a Motion for Acceptance of Superseding Pleading; and (2) a Motion for Acceptance of Table of Contents and Summary.

[2] Additionally, MTP has not documented its allegation that KQED has unreasonably interfered with MTP's efforts to obtain a transmitter site or otherwise made any showing warranting Commission action. *Compare with Alabama Citizens for Responsive Public Television, Inc.*, 69 FCC 2d at 1070-71 ¶ 24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-639

In re Applications of

TEXAS EDUCATIONAL BROADCASTING CO-OPERATIVE, INCORPORATED (hereafter "Broadcasting") Hornsby, Texas — File No. BPED-880401MG

THE UNIVERSITY OF TEXAS AT AUSTIN ON BEHALF OF TEXAS STUDENT PUBLICATIONS (hereafter "University") Austin, Texas — File No. BPED-880722MA

For Construction Permit
for a New Noncommercial
Educational FM Station on Channel 219A

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: February 5, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new noncommercial, educational FM station.

2. *Pending Matters.* In response to Item 3, Section II of Form 340, University has indicated in Exhibit 2A that it is a party in the pending court or administrative proceedings, involving matters of discrimination, below:

Murphy Hamilton, staff member, EEOC Charge No. 36B 880006, filed 10/20/87, race discrimination in termination.

Carl A. Rubino, faculty member, EEOC Charge No. 31C 880020, filed 9/28/87, retaliation alleged.

Oscar Saenz, staff member, EEOC Charge No. 310 87 0226, filed 3/18/87, national origin discrimination in promotion; EEOC Charge No. 360 88 0550, filed 1/26/88, retaliation in application.

Tagi Sagafi-Nejad, faculty member, EEOC Charge No. 065 83 0867, filed 2/23/83, national origin discrimination in failure to reappoint; EEOC Charge No. 065 85 0384, filed 5/11/84, age discrimination in faculty application.

Eddie J. Wallace, applicant, EEOC Charged No. 31C 88 0292, filed 4/21/88, race discrimination in hiring, retaliation.

Douglas R. Williams, staff member, EEOC Charge No. 310 87 0437, filed 8/21/87, race discrimination in termination.

Dr. Barbara Gold v. U. T. Austin, et al. Cause No. A86CA318, U.S. Dist. Ct. W. Dist. Tex., filed 6/3/86; Plaintiff alleges she was denied tenure in Classics Department because of sex discrimination. (Plaintiff lost in lower court and has appealed).

Leslie C. O' Bell v. U. T. Austin, et al, Cause No. A87CA015, U.S. Dist. Ct. W. Dist. Tex., filed 1/27/87; Plaintiff, a tenured professor, alleges sex discrimination regarding compensation, terms, conditions and privileges of employment.

Nancy Davis v. McDonald Observatory (U. T. Austin) et al, Cause No. 1412, 83rd Judicial Court, Ft. Davis, Jeff Davis County; Plaintiff alleges that she was subjected to sexual harassment.

Accordingly, an appropriate condition will be specified.

3. *Residence.* Section II, Item 4 of FCC Form 340 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. University has not completed Item 4 correctly. University's application gives the same address for each of its principals. Accordingly, University must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *Air Hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the University have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by University would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. *Share-time Arrangement.* None of the applicants have indicated that an attempt has been made to negotiate a share-time arrangement. Therefore, an issue will be specified to determine whether a share-time arrangement between the applicants would be the most effective use of the frequency and thus better serve the public interest. *Granfalloon Denver Educational Broadcasting, Inc.*, 43 Fed. Reg. 49560 (October 24, 1978). In the event that this issue is resolved in the affirmative, an issue will also be specified to determine the nature of such an arrangement. It should be noted that our action specifying a share-time issue is not intended to preclude the applicants, either before the commencement of the hearing or at any time during the course of the hearing, from participating in negotiations with a view toward establishing a share-time agreement among themselves.

6. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

7. Inasmuch as it appears that there would be a significant difference in the size of the areas and populations which would receive service from the proposals, and since

this proceeding involves competing applicants for noncommercial educational facilities, the standard areas and populations issue will be modified in accordance with the Commission's prior action in *New York University*, FCC 67-673, released June 8, 1967, 10 RR 2d 215 (1967). Thus, the evidence adduced under this issue will be limited to available non-commercial educational FM signals within the respective service areas.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the University would constitute a hazard to air navigation.

2. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That, in the event a construction permit is awarded to University as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in accordance with the outcome in Charge Numbers: 36B 880006, 31C 880020, 310 87 0226, 065 83 0867, 31C 88 0292, 310 87 0437 and Cause Numbers: A86CA318, A87CA015, 1412.

11. IT IS FURTHER ORDERED, That University shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-496

In the Matter of

Amendment of Section 73.202(b), RM-7381
Table of Allotments,
FM Broadcast Stations.
(Crawford, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 28, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Georgia Family Radio Limited Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6347 (1990), proposing the substitution of Channel 271C3 for Channel 271A at Crawford, Georgia, and the modification of its construction permit (BMPH-891109IC) for Station WGMG(FM) to specify operation on Channel 271C3. Broadcast Investment Properties, Inc. ("Broadcast"), successor-in-interest to the petitioner,[1] filed comments stating its intention to apply for Channel 271C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 271C3 for Channel 271A at Crawford, Georgia, since it would provide Crawford with an expanded coverage area FM service. Channel 271C3 can be allotted to Crawford in compliance with the Commission's minimum distance separation requirements with a site restriction of 17 kilometers (10.5 miles) northeast[2] in order to avoid a short-spacing to Station WGGA, Channel 270A at Cleveland, Georgia, and vacant but applied for Channel 271A at Bolingbroke, Georgia. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the construction permit of Station WGMG(FM) to specify operation on Channel 271C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 21, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Crawford, Georgia	271C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Station WGMG(FM), Crawford, Georgia, IS MODIFIED to specify operation on Channel 271C3 in lieu of Channel 271A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Broadcast Investment Properties, Inc., is the assignee of Station WGMG(FM).

[2] The coordinates are North Latitude 33-57-10 and West Longitude 82-59-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-09

In the Matter of

Amendment of Section 73.202(b), RM-7423
Table of Allotments,
FM Broadcast Stations.
(Greenfield and Del Rey Oaks,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 28, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making, as amended,[1] filed on behalf of Troposphere Broadcasting Limited Partnership (petitioner), permittee of Station KQKZ(FM), Channel 300B, Greenfield, California, requesting the reallotment of its channel to Del Rey Oaks, California, and modification of its construction permit to specify operation on Channel 300A at the new community. If modified, petitioner states that it will promptly file an application to relocate its transmitter site to provide Del Rey Oaks with a city grade signal.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[2] Petitioner premises its proposal on its desire to provide a first local aural transmission service to Del Rey Oaks. Petitioner states that the allotment of Channel 300A to Del Rey Oaks (pop. 1,557) [3] is mutually exclusive with the present allotment of Channel 300B at Greenfield (pop. 4,181). The distance between the petitioner's presently authorized site at Greenfield[4] and the site suggested for its use on Channel 300A at Del Rey Oaks[5] is 67 kilometers (42 miles), whereas Commission Rule 73.207(b)(1) requires a distance of 178 kilometers (110 miles) between co-channel Class A and B stations. Petitioner states that its proposal would not deprive Greenfield of local service.[6]

3. In further support of its proposal, petitioner advises that although its request would result in a downgrade of Station KQKZ(FM) from a Class B to a Class A station, the reallotment to Del Rey Oaks would enable the station to provide a signal strength of 60 dBu or greater to 250,466 persons in an area of 1,181 square kilometers, whereas its use on Channel 300B at Greenfield would provide a signal strength of 60 dBu or greater to 200,458 persons in an area of 7,206 square kilometers.

4. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Del Rey Oaks is within the Seaside-Monterey Urbanized Area as defined by the U.S. Census. We question whether Del Rey Oaks is deserving of a first local FM service preference, or whether Del Rey Oaks should be credited with all of the aural services authorized to communities within the Seaside-Monterey Urbanized Area. Petitioner is requested to submit information sufficient to show that Del Rey Oaks is deserving of such a preference. *See Community of License MO & O*, 5 FCC Rcd 7094 (1990).

5. In light of the above, although we are unable to conclude at this time that the public interest would be served by substituting Channel 300A for Channel 300B and reallotting the channel from Greenfield to Del Rey Oaks, California, we will tentatively propose to do so, pending an evaluation of the requested information. A staff engineering review of the proposal confirms that Channel 300A can be allotted to Del Rey Oaks in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided Channel 300B is deleted at Greenfield. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 300A at Del Rey Oaks or require the petitioner to demonstrate the availability of an additional equivalent channel at that community.

6. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Del Rey Oaks, California	--	300A
Greenfield, California	258B, 300B	258B

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **March 28, 1991**, and reply comments on or before **April 12, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Howard M. Liberman, Esq.
Jonathan V. Cohen, Esq.
Arter & Hadden
1919 Penn. Ave., N.W.
Suite 400
Washington, D.C. 20006

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner originally requested the reallotment of Channel 300B to Chualar, California, but amended its proposal to specify Del Rey Oaks.

[2] *See Amendment to the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *pets. for recon. granted in part*, 5 FCC Rcd 7094 (1990) (*"Community of License MO&O"*).

[3] Population figures are from the 1980 U.S. Census.

[4] Coordinates at the site specified in the construction permit issued to the petitioner at Greenfield are 36-19-50 and 121-10-16.

[5] Coordinates used for Channel 300A at Del Rey Oaks are 36-34-47 and 121-50-50.

[6] Station KSUR-FM, Channel 258B, has been issued a license to cover its construction permit (File No. BLH-890807KE) at Greenfield. Additionally, we note that an application has been filed by Prunedale Educational Association (File No. BPED-890214ME) to operate a noncommercial educational FM station on Channel 219B at Greenfield. Although Prunedale's application may constitute an additional factor to be considered in resolving petitioner's proposal, it does not constitute an "existing service" in analyzing this proposal. *See Community of License MO&O*, 5 FCC Rcd 7094, 7097 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-211

In the Matter of

Amendment of Section 73.202(b),	RM-7178
Table of Allotments,	RM-7515
FM Broadcast Stations.	
(Gretna, Marianna, Quincy and	
Tallahassee, Florida)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 24, 1991; Released: February 4, 1991

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Dolcom Broadcasting, Inc. ("Dolcom"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 2668 (1990), proposing the substitution of Channel 276C2 for Channel 276A at Tallahassee, Florida, and modification of its license for Station WTHZ(FM) to specify operation on the higher class channel. The *Notice* also proposed the substitution of Channel 231A for vacant but applied for Channel 227A at Marianna, Florida, for which two applications are pending,[1] substitution of Channel 227A for Channel 264A at Gretna, Florida, and modification of the license for Station WGWD(FM), and substitution of Channel 264A for vacant but applied for Channel 274A at Quincy, Florida, for which two applications are pending.[2]

2. In response to the *Notice*, Dolcom filed comments restating its intention to apply for Channel 276C2, if allotted. Asset Investments, Inc., licensee of Channel 264A at Gretna, Florida, filed supporting comments. Wolff Broadcasting Corporation ("Wolff"), licensee of Station WIJK(FM), Channel 227C2, Evergreen, Alabama, filed supporting comments. William F. Dunkle, III ("Dunkle") filed a counterproposal seeking the allotment of Channel 276A to Steinhatchee, Florida, as that community's first local FM broadcast service.[3] Kudzu Broadcasting Partnership ("Kudzu"), licensee of Station WQUH(FM), Channel 276A, Defuniak Springs, Florida, filed a counterproposal requesting the substitution of Channel 276C1 for Channel 276A at Defuniak Springs or Freeport, Florida, and the modification of Station WQUH's license. Thomasville Radio, Inc. ("TRI"), licensee of Station WSTT(FM), Channel 296A, Thomasville, Georgia, filed opposing comments. Dolcom and Kudzu filed reply comments.[4] After the record closed, Dunkle filed a request for leave to file responsive comments. Dolcom filed a motion to strike Dunkle's comments, as well as an opposition. Dunkle filed a letter.[5]

3. Dunkle, in its counterproposal, states that Steinhatchee is not incorporated, but lies within both Taylor and Dixie Counties, Florida. Dunkle notes that Steinhatchee has a post office with its own zip code, a grade school and six churches. He alleges that Steinhatchee has a business district which includes restaurants and other retail outlets and that its population is approximately 1,500 permanent residents, which elevates substantially during the tourist season when the area attracts many campers and fishing enthusiasts. He adds that there is a volunteer fire department in Steinhatchee, and that Steinhatchee is served by the Steinhatchee Water Association, a self-sufficient water system which is governed by a local voluntary board of directors. According to Dunkle, Taylor County provides a sheriff to patrol duties in Steinhatchee.

4. In response to Dunkle's counterproposal, Dolcom contends that Steinhatchee does not rise to the level of a cognizable community for allotment purposes. Dolcom states that Steinhatchee straddles the counties of Taylor and Dixie, is not recognized by any governmental body as a municipality, and is not incorporated or listed by the U.S. Census. Dolcom also contends that Steinhatchee has no internal governing body, mayor, city hall, chamber of commerce, and no municipally provided services of any kind, and no real community identity. Dolcom states that Steinhatchee is a quiet, sparsely populated area, and most of the residents are retirees or fishermen, seeking to live in a rural setting. While it contains a small number of businesses, such as convenience stores, a hardware store, and a mechanic shop to provide area residents with some essential services, Dolcom alleges that the nearest grocery and clothing stores are located in Perry and Cross City, Florida. Dolcom contends that there is no "business district" in Steinhatchee and that, the area is devoid of sidewalks and traffic lights. Dolcom notes that in the event the Commission deems Steinhatchee to be a community for allotment purposes, there are alternative channels available for allotment to Steinhatchee. Dolcom recommends that either Channel 243A or Channel 257A be allotted to Steinhatchee.

5. The Commission's policy is that, if a community is not incorporated or listed in the census reports, the proponents of an allotment must show the place to be a geographically identifiable population grouping.[6] The proponent needs not show that the borders of the locality are precisely ascertainable. Instead, what must be shown is that residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents or by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'".[7] Examples of objective indications of community status include receipts from local businesses, photographs of local churches, the existence of political, commercial, social and religious organizations, and services in the community. Another indication of community status is "whether the residents function as and conceive of themselves as residents of a community, around which their interests coalesce."[8]

6. Based upon the showing submitted by Dunkle, we do not believe that Steinhatchee is a community for allotment purposes. Although the 1988 edition of the *Rand McNally Commercial Atlas* lists Steinhatchee as having a population of 800, the town is neither incorporated nor listed in the U.S. Census. In addition, Dunkle has not shown other indicia of community status such as political, social, or business organizations, or testimony of local residents. In this regard, it appears that there is no local government. Furthermore, while Dunkle has alleged that

there are some local businesses and churches, he has not specifically identified these entities or shown that they are intended to serve Steinhatchee, as opposed to other areas. This is a critical deficiency because, in past cases, we have rejected claims of community status where a nexus has not been shown between the political, social, and commercial organizations and the community in question. *See, e.g., Coker, Alabama*, 43 R.R. 2d 190, 193 (1978); and *Malone and Owls Head, New York*, 3 FCC Rcd 5243 (1988). *Cf. Semora, North Carolina, supra* note 7. Accordingly, we believe that the record in this proceeding is insufficient to find that Steinhatchee is a community for allotment purposes, and we will therefore not allot Channel 276A to Steinhatchee. However, since other channels may be available for allotment to Steinhatchee, our decision in this proceeding should not preclude Dunkle or any other party from filing a new petition for rule making which would provide additional information regarding Steinhatchee's status as a community.[9]

7. An engineering analysis has determined that Channel 276C2 can be substituted for Channel 276A at Tallahassee's present transmitter site in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) northeast of the community.[10] Channel 227A can be substituted for Channel 264A at Gretna in compliance with the minimum distance separation requirements with a site restriction of 8.7 kilometers (5.4 miles) southeast at Station WGWD's licensed site.[11] Channel 231A can be substituted for vacant but applied for Channel 227A at Marianna in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.2 kilometers (0.8 miles) south,[12] and Channel 264A can be substituted for vacant but applied for Channel 274A at Quincy in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.6 kilometers (4.1 miles) southeast.[13]

8. After consideration of the information filed in this proceeding, we believe the public interest would be served by the substitution of Channel 276C2 for Channel 276A at Tallahassee, Florida. In order to accommodate the upgrade at Tallahassee, we will substitute Channel 227A for Channel 264A at Gretna, substitute Channel 231A for vacant but applied for Channel 227A at Marianna, and substitute Channel 264A for vacant but applied for Channel 274A at Quincy. In accordance with Section 1.420(g) of the Commission's Rules, we will modify the license of Station WTHZ(FM) at Tallahassee to specify operation Channel 276C2, and we will also modify the license of Station WGWD(FM) at Gretna to specify operation on Channel 227A.[14]

9. Dolcom has stated its willingness to reimburse the licensee of Station WGWD for all reasonable and necessary expenses incurred with the change in channels. *See Circleville, Ohio*, 8 FCC 2d 159 (1967).

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **March 21, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Gretna, Florida	227A
Marianna, Florida	231A
Quincy, Florida	264A
Tallahassee, Florida	235C, 241C2 255C1, 276C2, 281C, 291A

11. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WTHZ(FM), Tallahassee, Florida, IS MODIFIED to specify operation on Channel 276C2 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WGWD(FM), Gretna, Florida, IS MODIFIED to specify operation on Channel 227A in lieu of Channel 264A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license (BLH-890630KE) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license (BLH-890630KE) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

13. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the applicants for Channel 227A at Marianna, Florida, and Channel 274A at Quincy, Florida, as follows:

Jackson Radio, Ltd.
P.O. Box 777
Marianna, FL 32446
(BPH-880630MG)

Shelia Ann Adams
314 South Jefferson Street
Marianna, FL 32446
(BPH 880629MJ)

Monte R. Bitner &
Leah R. James
Route 6, Box 586
Quincy, FL 32551
(BPH-870227ME)

Quincy Broadcasters, Inc.
Route 4, Box 1550
Havana, FL 32333
(BPH-870313NY)

14. IT IS FURTHER ORDERED, That the request of William F. Dunkle, III for the allotment of Channel 276A to Steinhatchee, Florida (RM-7515), IS DENIED.

15. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Applicants for Channel 227A at Marianna, Florida, are Jackson Radio Ltd. (BPH-880630MG) and Sheila Ann Adams (BPH-880629MJ).

[2] Applicants for Channel 274A at Quincy, Florida, are Monte R. Bitner-Leah R. James (BPH-870227ME), and Quincy Broadcasters, Inc. (BPH-870313NY).

[3] Public Notice of the counterproposal was given on October 12, 1990, Report No. 1827 (RM-7515).

[4] Thereafter, on September 24, 1990, TRI withdrew its opposing comments and now supports Dolcom's proposal. In addition, on September 25, 1990, Kudzu requested voluntary dismissal and withdrawal of its counterproposal. Therefore, we will dismiss Kudzu's counterproposal and all comments responsive thereto will not be discussed. Kudzu's reply comments are moot, due to the withdrawal of its counterproposal.

[5] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment period. Therefore, in accordance with Section 1.415(d) of the Commission's Rules, we shall not accept the unauthorized pleadings.

[6] *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982).

[7] *See Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987). *See also Semora, North Carolina*, 5 FCC Rcd 934 (1990).

[8] *See Mighty - Mac Broadcasting Co.*, 58 RR 2d 599, 603, (1985); *North Naples, Florida*, 41 RR 2d 1549, 1551 (1977).

[9] In its reply comments, Dolcom also argued that Dunkle's counterproposal was procedurally defective because he failed to submit the proper expression of interest in the channel required of counterproponents. While Dunkle represented that he would apply for a construction permit if the channel were allotted, Dolcom contends that Dunkle failed to represent that, if he became the permittee, he would build the station promptly as required in the Appendix to the *Notice of Proposed Rule Making* in this proceeding. However, in view of our determination that Steinhatchee is not a community for allotment purposes, it is not necessary for us to decide this issue.

[10] The coordinates for Channel 276C2 at Tallahassee are North Latitude 30-29-43 and West Longitude 84-13-51.

[11] The coordinates for Channel 227A at Gretna are North Latitude 30-33-24 and West Longitude 84-36-05.

[12] The coordinates for Channel 231A at Marianna are North Latitude 30-45-47 and West Longitude 85-13-52.

[13] The coordinates for Channel 264A at Quincy are North Latitutde 30-32-05 and West Longitude 84-32-37.

[14] Since these allotments are made pursuant to a petition for rule making filed prior to October 2, 1989, the licensee of Station WTHZ(FM) at Tallahassee, the licensee of Station WGWD(FM) at Gretna, and the applicants at Marianna, and Quincy, Florida, may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 4, 1991

PACIFIC BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On December 20, 1990, Pacific Bell filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. These revisions reflect the transfer of voice mail, electronic messaging, voice storage and forward and fax store and forward services to a separate subsidiary, Pacific Bell Information Services. The formation of this subsidiary is contingent upon California Public Utilities Commission approval.

Parties may file comments on the proposed revisions to the cost manual no later than **March 1, 1991.** Replies should be filed by **March 18, 1991.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N. W., Room 812, Washington, D.C. Copies are also available from FCC.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell's
Permanent Cost Allocation Manual
for the Separation of Regulated
and Nonregulated Costs

ORDER

Adopted: January 25, 1991; Released: February 4, 1991

By the Chief, Accounting and Audits Division:

1. On January 9, 1991, Pacific Bell (Pacific) filed a revision to its Cost Allocation Manual (CAM)[1] that it claims will enhance current time reporting procedures for Operations personnel. Pacific states that this enhancement implements a statistically valid sampling technique as an augment to current time reporting procedures. The primary component of Pacific's proposal is a statistical sampling methodology that analyzes time spent on various activities by operating technicians. The technicians sampled will identify specific activities and time incurred with the daily workload, and then coding analysts will convert the time reported by technicians into the various accounting classifications. Pacific believes that its proposal is consistent with well-established, statistically-based accounting procedures, and notes that its proposal will not change pool allocation methods and is fully auditable.

2. Normally, a revision to the time reporting procedures specified in a cost allocation manual is effective 60 days following the submission of the revision. However, in this instance, we believe that Pacific's proposed revision raises serious concerns, not only as to how the costs associated with Operating personnel are to be allocated between regulated and nonregulated activities, but also as to how these costs are to be assigned initially to the appropriate Part 32 Accounts. Because of these concerns, we will stay the effective date of this revision for 180 days, or until September 10, 1991. During this period, we will review whether the revision complies with the Commission's cost allocation rules and policies. This stay is in accordance with the *Nevada and Pacific Order* which states that, "[P]roposed amendments to the manual will be deemed accepted unless the Common Carrier Bureau, pursuant to its delegated authority, stays the effectiveness of the change or rejects the change."[2]

3. Accordingly, IT IS ORDERED that the revision to Pacific's Cost Allocation Manual filed January 9, 1991 IS STAYED until September 10, 1991.

4. IT IS FURTHER ORDERED that parties may file comments on Pacific's revisions no later than February 25, 1991. Pacific may file reply comments no later than March 11, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

FOOTNOTES

[1] On January 10, 1991, Pacific filed a correction of a typographical error contained in the cover letter accompanying the January 9 submission.

[2] Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 301 (Com. Car. Bur. 1988) (*Nevada and Pacific Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE SOUTHWEST AAD 8-1902

Request to Allow Amortization
of Debt Refinancing Expenses and
Unamortized Discounts and Premiums
Associated with Reacquired Debt

ORDER

Adopted: January 24, 1991; Released: February 4, 1991

By the Chief, Common Carrier Bureau:

1. On May 8, 1990, the Common Carrier Bureau ("Bureau") denied a request by GTE Southwest Incorporated ("GTE") for permission to amortize expenses associated with certain bond and preferred stock redemptions.[1] The Bureau also found GTE apparently liable for a forfeiture of $9000 under Section 220(d) of the Communications Act [2] for its failure to follow the Commission's rules when accounting for these redemptions. By pleadings filed June 7, 1990, GTE contested the proposed forfeiture and sought Commission review of the Bureau's decision.

2. On January 10, 1991, GTE withdrew its Application for Review of the Bureau's decision, and tendered payment of the proposed forfeiture. [3] As GTE no longer contests this matter, this proceeding is concluded.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* GTE Southwest, Request to Allow Amortization of Debt Refinancing Expenses and Unamortized Discounts and Premiums Associated with Reacquired Debt, *Memorandum Opinion and Order and Notice of Apparent Liability*, 5 FCC Rcd 2897 (Com.Car.Bur. 1990).

[2] 47 U.S.C. §220(d).

[3] *See* Letter from Carol L. Bjelland, Director, Regulatory Matters, GTE Service Corporation to Cynthia D. Jalloh (January 10, 1991) (transmitting payment of the forfeiture).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, et al.,
Complainants,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-382
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-383
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-384
WISCONSIN BELL, INC.	File No. E-89-385
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-386
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-387
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-388
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-389
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-390
GTE NORTH, INC.,	File No. E-89-391
GTE SOUTH, INC.,	File No. E-89-392
GTE SOUTHWEST, INC.,	File No. E-89-393
CENTRAL TELEPHONE COMPANY and	File No. E-89-395
THE CONTINENTAL TELEPHONE COMPANIES,	File No. E-89-396
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY, L.P.,
Complainant,

v.

PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-89-368
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-89-369
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-370
THE DIAMOND STATE TELEPHONE COMPANY,	E-89-371
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-89-372
NEW JERSEY BELL TELEPHONE COMPANY,	E-89-373
MICHIGAN BELL TELEPHONE COMPANY,	E-89-374
WISCONSIN BELL, INC.,	E-89-375
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-89-376
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-89-377
PACIFIC BELL TELEPHONE COMPANY,	E-89-378
SOUTHERN NEW ENGLAND TELEPHONE COMPANY,	E-89-380
WISCONSIN BELL, INC.,	E-90-116
MICHIGAN BELL TELEPHONE COMPANY,	E-90-117
OHIO BELL TELEPHONE COMPANY,	E-90-118
INDIANA BELL TELEPHONE COMPANY,	E-90-119
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-120
SOUTH CENTRAL BELL TELEPHONE,	E-90-121
NEW YORK TELEPHONE COMPANY,	E-90-122
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-123
CINCINNATI BELL TELEPHONE COMPANY,	E-90-125
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-126
NEVADA BELL TELEPHONE COMPANY and	E-90-156
PACIFIC BELL TELEPHONE COMPANY,	E-90-157

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILLIAMS TELECOMMUNICATIONS GROUP, INC., Complainant,	
v.	
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-397
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-398
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-399
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-400
THE BELL ATLANTIC TELEPHONE COMPANIES,	File No. E-90-444
BELLSOUTH CORPORATION,	File No. E-90-445
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-446
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-447
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-448
OHIO BELL TELEPHONE COMPANY,	File No. E-90-449
WISCONSIN BELL, INC.,	File No. E-90-450
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-451
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-452
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-453
PACIFIC BELL TELEPHONE COMPANY and	File No. E-90-454
SOUTHWESTERN BELL TELEPHONE COMPANY, Defendants.	File No. E-90-455

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MIDAMERICAN LONG DISTANCE COMPANY,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-401
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-402
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-403
WISCONSIN BELL, INC.,	File No. E-89-404
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-406
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY and	File No. E-89-407
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-408

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTER NETWORK COMPANY, L.P.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	E-89-414
WISCONSIN BELL, INC.,	E-89-415
NORTHWESTERN BELL TELEPHONE COMPANY,	E-89-416
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-89-417
GTE NORTH, INC.,	E-89-418
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-270
INDIANA BELL TELEPHONE COMPANY,	E-90-271
MICHIGAN BELL TELEPHONE COMPANY,	E-90-272
OHIO BELL TELEPHONE COMPANY,	E-90-273
NEW YORK TELEPHONE COMPANY,	E-90-274
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-275
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-276
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-277
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-90-278
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-279
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-280
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-281
CINCINNATI BELL TELEPHONE COMPANY,	E-90-282
GTE NORTH, INC.,	E-90-284
UNITED TELEPHONE COMPANY OF INDIANA and	E-90-285
UNITED TELEPHONE COMPANY OF OHIO,	E-90-286

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PHONE AMERICA
OF CAROLINA, INC.,
Complainant,

v.

CONTEL OF NORTH CAROLINA, INC.,	E-89-363
ILLINOIS BELL TELEPHONE COMPANY and	E-89-364
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-89-367

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Cariers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC., Complainant,	
v.	
THE DIAMOND STATES TELEPHONE COMPANY,	File No. E-89-343
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-344
WISCONSIN BELL, INC.,	File No. E-89-345
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-346
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-347
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-348
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-349
NEW YORK TELEPHONE COMPANY,	File No. E-90-183
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-184
ILLINOIS BELL TELEPHONE COMPANY,	File No. E-91-30
INDIANA BELL TELEPHONE COMPANY,	File No. E-91-31
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-32
OHIO BELL TELEPHONE COMPANY and	File No. E-91-33
WISCONSIN BELL, INC., Defendants.	File No. E-91-34

ORDER

Adopted: January 25, 1991; Released: February 5, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application for Review Concerning
Liability of The Dalton Group, Inc.,
Former Licensee of Radio Stations
WXTR and WXTR-FM, La Plata, Maryland

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 1991; Released: February 5, 1991

By the Commission:

1. The Commission has under consideration an Application for Review of the Mass Media Bureau's Forfeiture Order finding the Dalton Group, Inc. ("Dalton"), former licensee of WXTR(AM) and WXTR-FM, La Plata, MD[1], in violation of the Commission's main studio, program origination and public inspection file rules and imposing a $10,000 forfeiture.

2. A Notice of Apparent Liability (NAL) was issued against Dalton after a November 25, 1985, on-site investigation by the Mass Media Bureau's Complaints and Investigations Branch determined that Dalton had repeatedly violated Sections 73.1125, 73.1130 and 73.3526(d) of the Commission's Rules.[2] These rules required a broadcast licensee to maintain a main studio in its community of license (Section 73.1125), to originate a majority of its non-network programming from that main studio (Section 73.1130), and to maintain a public inspection file in the community of license (Section 73.3526). Although the stations were licensed to La Plata, the investigators found the studio there locked and unoccupied. The stations were operating from a studio in Marlow Heights, MD, some thirty miles away without having requested or received a waiver of the program origination rule that would have permitted them to originate a majority of its entertainment programming from an auxiliary studio ("Arizona Waiver"). The facts are set forth in full detail in the NAL.

3. In its Application for Review, Dalton presents two questions for review: first, "Whether the Mass Media Bureau properly considered Dalton's allegations and arguments with regard to mitigation or remission of the $10,000 forfeiture assessed;" and second, "Whether the amount of the forfeiture is consistent with precedent, policy and prior decisions particularly an analogous matter where a $10,000 forfeiture was reduced to $1,300." In addressing the first question, Dalton re-asserts arguments it has previously made, and expresses a belief that its contentions, particularly in regard to its service to the La Plata community, have yet to be "fully and fairly considered and decided in either the Forfeiture Order or the Reconsideration Order." In addressing the second question, Dalton cites *Memorandum Opinion and Order, Liability of James River Broadcasting Corp.*, issued April 29, 1987, by the Mass Media Bureau.

4. Dalton states that in determining the amount of a forfeiture penalty, consideration should be given to the seriousness or "gravity" of the violations alleged and the circumstances under which they arose.[3] Dalton states that after the NAL was issued, the Commission modified its main studio location rules and eliminated its program origination requirements and, in so doing, called into question the rationale for them. Dalton admits that these changes do not excuse prior violations, but asserts they should be considered both with regard to the facts of the violations and their gravity. Consequently, Dalton believes that its violation of these rules before their change or elimination should warrant a mild sanction, if any.

5. Dalton also points to asserted good faith efforts to comply with the Commission's requirements by seeking and relying on counsel's advice that Dalton's actions would comply with the Commission's rules. Dalton states that these factors warrant either a substantial reduction in the amount of the forfeiture or its recission altogether.

6. With respect to the alleged public inspection file violation, Dalton characterizes its conduct as being in "technical" violation of part of the rule (*i.e.*, that portion regarding the file's location and availability during normal business hours), and argues that it prejudiced no one since access to the stations' file was never requested and since the file was always available within a reasonable time. Accordingly, Dalton believes that the portion of the forfeiture attributable to the violation of the public inspection file rule should be rescinded. Additionally, Dalton believes that its record of local service should be considered and that the $10,000 forfeiture should be rescinded or substantially mitigated.

7. Dalton also argues that comparison with other cases warrants recission or mitigation of the forfeiture because $10,000 forfeitures have been assessed for "serious conduct distinguishable from all violations alleged against Dalton," and cites cases that it believes support that proposition. Finally, Dalton states that the *James River* case, cited by the Commission in the Forfeiture Order, resulted in a forfeiture reduction from $10,000 to $1,300. Dalton believes the instant case to be analogous, and requests a similar result.

8. Dalton's arguments, with one exception, are unpersuasive. The licensee has failed to demonstrate that the actions taken pursuant to delegated authority were in conflict with the law, precedent or policy. The main studio and program origination rules were clearly violated. The public inspection files were not readily available for inspection during regular business hours at the main studio, or other accessible place in the community of license, as required by the rule. The subsequent changes in the rules do not preclude the Commission from enforcing the rules against violations that occurred prior to the changes. *Court House Broadcasting Co.*, 25 RR 649 (1963); *Hanson R. Carter*, 23 FCC2d 511 (1970). Nor will the allegedly faulty advice of counsel or licensee's good faith reliance on it excuse Dalton's failure to comply with the rules. *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242 (1984).

9. Dalton's reliance on the Bureau's decision in *James River*, in which a $10,000 forfeiture was reduced to $1,300, is misplaced. The $10,000 was assessed for apparent violation of the main studio rule, the program origi-

nation rule and the public inspection file rule. Subsequently, the Commission found that the main studio rule had not been violated; rather, the licensee had violated only the requirement to notify the Commission that it had moved its main studio to its transmitter site, as permitted by the rules. The Commission also accepted the licensee's contentions that the program origination rule had not been violated. Thus, the $1,300 forfeiture was issued only for failure to timely notify the Commission of the main studio relocation, as required by Section 73.1125(b)(3)(iii) and the public inspection file violation. The analogous situation to the instant case existed in the *James River* case when the main studio rule, program origination rule, and public inspection file rule were deemed to have been violated, and the forfeiture amount was $10,000.

10. As to the factors diminishing the gravity of the violations and warranting reduction in the forfeiture, while we concur in the Bureau's judgment that the forfeiture amount assessed was consistent with applicable precedent, we note that Dalton's service to and involvement with the La Plata community were demonstrated to be significant and, accordingly, warrant mitigation of the forfeiture amount. Although this type of effort would not normally warrant forfeiture mitigation, it does in this case because the instant violations are associated with abandonment of community. Further, the licensee has compiled an otherwise excellent compliance record.

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed December 22, 1989, by The Dalton Group, Inc., former licensee of Stations WXTR and WXTR-FM, La Plata, Maryland IS GRANTED, IN PART, AND DENIED, IN PART.

12. IT IS FURTHER ORDERED That The Dalton Group, Inc., former licensee of Stations WXTR and WXTR-FM, La Plata, Maryland, SHALL FORFEIT to the UNITED STATES OF AMERICA the sum of seven thousand, five hundred dollars ($7,500) for repeated violations of Section 73.1125, 73.1130 and 73.3526(d) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] There have been several changes of licensee with respect to WXTR(AM) and WXTR-FM since the subject violations occurred. WXTR(AM) (now WSMD), is currently licensed to Southernwood Media Corporation; WXTR-FM is currently licensed to Radio Ventures I, L.P. To simplify matters we continue to use the name Dalton for purposes of this proceeding and references to "licensee" refer to Dalton.

[2] The first two of these rules have since been changed, effective July 16, 1987. *See Main Studio and Program Origination Rules*, 2 FCC Rcd. 3215 (1987) *recon. denied*, 3 FCC Rcd 5024 (1988). The main studio rule, Section 73.1125, was modified and the program origination rule, Section 73.1130, was deleted.

[3] In support, Dalton cites Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b)(2), in which Congress specified the factors which the Commission should consider in determining the amount of a forfeiture penalty. These factors are: the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-420
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-89-421
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-210
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACCESS LONG DISTANCE CORPORATION,
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-422
NEW YORK TELEPHONE COMPANY, and	File No. E-90-315
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	File No. E-90-316

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-424
GTE NORTH, INC.,	File No. E-89-425
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-258
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-259
OHIO BELL TELEPHONE COMPANY,	File No. E-90-260
NEW YORK TELEPHONE COMPANY,	File No. E-90-262
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-263
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-264
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-265
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-266
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-267
CINCINNATI BELL TELEPHONE COMPANY and	File No. E-90-268
GTE NORTH, INC.,	File No. E-90-269

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH
COMPANY,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY, and — File No. E-90-42
WALNUT HILL TELEPHONE COMPANY, — File No. E-90-60
Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID ATLANTIC TELECOM, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-185
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-186
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-187
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-188
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA and	File No. E-90-189
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-190

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-89-426
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-427
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-89-428
WISCONSIN BELL, INC.,	File No. E-89-429
PACIFIC BELL TELEPHONE COMPANY,	File No. E-89-430
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-89-431
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-89-432
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-433
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-89-434
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-160
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-161
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-162
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-163
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-164
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-165
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-166
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-167
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-168
OHIO BELL TELEPHONE COMPANY,	File No. E-90-169
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-170
NEVADA BELL TELEPHONE COMPANY,	File No. E-90-174
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-175
SOUTH CENTRAL BELL TELEPHONE COMPANY and	File No. E-90-176
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-177

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order [1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers. [2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ONE CALL COMMUNICATIONS, INC.,
Complainant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-193
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-194
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-195
CINCINNATI BELL TELEPHONE COMPANY,	E-90-197
PACIFIC BELL TELEPHONE COMPANY,	E-90-198
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-199
MICHIGAN BELL TELEPHONE COMPANY,	E-90-200
INDIANA BELL TELEPHONE COMPANY and	E-90-201
OHIO BELL TELEPHONE COMPANY,	E-90-202
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SOUTH GEORGIA COMMUNICATIONS, INC. File No. 63500-91-16-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KIY503 in the Public Land Mobile Service at Jackson, Florida

ORDER

Adopted: January 30, 1991; Released: February 6, 1991

By the Chief, Mobile Services Division:

1. On November 19, 1990, the Mobile Services Division issued a Notice of Apparent Liability for Forfeiture (*NALF*) to South Georgia Communications, Inc. (South Georgia), finding that an apparent violation of Section 22.9(b)(1) of the Commission's rules had occurred for operating Station KIY503 at Jackson, Florida, in an unauthorized manner, and assessed a forfeiture in the amount of $3,000.00.

2. South Georgia has taken no action in response to the *NALF*, and the $3,000.00 forfeiture has remained unpaid. As a result, South Georgia is hereby ordered to pay $3,000.00

ORDERING PARAGRAPHS

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that South Georgia Communications, Inc. FORFEIT to the United States the sum of Three Thousand Dollars ($3,000.00) for the violation of Section 22.9(b)(1) of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

4. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to South Georgia Communications, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ADVANCED TELECOMMUNICATIONS CORPORATION, AND ITS SUBSIDIARIES, Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	E-90-352
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-353
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-354
MICHIGAN BELL TELEPHONE COMPANY,	E-90-355
WISCONSIN BELL, INC.,	E-90-356
SOUTHWESTERN TELEPHONE COMPANY,	E-90-357
NORTHWESTERN BELL TELEPHONE COMPANY and	E-90-360
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-361

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTH TEL, INC.,
Complainant,

v. File No. E-90-390

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TFN CORP.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-203
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND	E-90-204
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-205
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-206
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-207
NEW YORK TELEPHONE COMPANY and	E-90-208
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-209
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-214
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-215
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-216
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-217
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-218
THE DIAMOND STATE TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-219
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-220
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-221
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-222
OHIO BELL TELEPHONE COMPANY,	File No. E-90-223
NEW YORK TELEPHONE COMPANY,	File No. E-90-224
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-225
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-229
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-230
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-231
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-232
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-233
CONTEL OF ARKANSAS, INC.,	File No. E-90-236
CONTEL OF CALIFORNIA, INC.,	File No. E-90-237
CONTEL OF INDIANA, INC.,	File No. E-90-238
CONTEL OF IOWA, INC.,	File No. E-90-239
CONTEL OF KANSAS, INC.,	File No. E-90-240
CONTEL OF KENTUCKY, INC.,	File No. E-90-241
CONTEL OF MISSOURI, INC.,	File No. E-90-242
CONTEL OF NORTH CAROLINA, INC.,	File No. E-90-243
CONTEL OF SOUTH ALABAMA, INC.,	File No. E-90-244
CONTEL OF SOUTH GEORGIA, INC.,	File No. E-90-245
GTE NORTH, INC.,	File No. E-90-246
GTE SOUTHWEST, INC.,	File No. E-90-247
CAROLINA TELEPHONE AND TELEGRAPH COMPANY, INC.,	File No. E-90-248
UNITED TELEPHONE OF THE CAROLINAS, INC.,	File No. E-90-249
UNITED TELEPHONE OF INDIANA, INC.,	File No. E-90-250
UNITED TELEPHONE OF NEW JERSEY, INC.,	File No. E-90-251
UNITED TELEPHONE OF OHIO, INC. and	File No. E-90-252
UNITED TELEPHONE OF TENNESSEE, INC.,	File No. E-90-253
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FIRST PHONE OF NEW ENGLAND, INC., Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-303
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-304
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-305
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-306
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-307
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-308
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-309
OHIO BELL TELEPHONE COMPANY,	E-90-310
NEW YORK TELEPHONE COMPANY,	E-90-311
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY and	E-90-312
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-313

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

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Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

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[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS, CORP., Complainant,	
v.	
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-317
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-318
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-319
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-320
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-321
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-322
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-323
INDIANA BELL TELEPHONE COMPANY,	E-90-324
MICHIGAN BELL TELEPHONE COMPANY,	E-90-325
OHIO BELL TELEPHONE COMPANY,	E-90-326
WISCONSIN BELL, INC.,	E-90-327
NEW YORK TELEPHONE COMPANY,	E-90-328
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-329
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-330
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-331
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	E-90-332
PACIFIC BELL TELEPHONE COMPANY,	E-90-333
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-334
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-335
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-336
CINCINNATI BELL TELEPHONE COMPANY,	E-90-337
GTE NORTH, INC.,	E-90-340
UNITED TELEPHONE COMPANY OF THE CAROLINAS,	E-90-342
UNITED TELEPHONE COMPANY OF INDIANA,	E-90-343
UNITED TELEPHONE COMPANY OF OHIO and	E-90-344
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-345
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

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4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,	E-90-346
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-347
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-348
MICHIGAN BELL TELEPHONE COMPANY,	E-90-349
WISCONSIN BELL, INC.,	E-90-350
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-90-351
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	E-90-362
PACIFIC NORTHWEST BELL TELEPHONE COMPANY and	E-90-363
NORTHWESTERN BELL TELEPHONE COMPANY,	E-90-364
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 6, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: January 10, 1991; Released: February 8, 1991

By the Commission:

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I. INTRODUCTION AND BACKGROUND

1. Price cap regulation for most of AT&T's common carrier services has been in effect for a period of approximately a year and a half.[1] Eighteen parties have asked this Commission to reconsider various parts of the price cap system that was implemented on July 1, 1989.[2] In the instant order, we generally affirm the price cap system as it was adopted and implemented, and we make a series of clarifying statements and amendments to our rules. First, we make minor clarifying amendments to our rule specifying the cost showing that accompanies below-band rates. We also make minor clarifications to our streamlined tariff procedures so that certain simple, noncontroversial filings that would otherwise be subject to more lengthy notice periods may be given streamlined treatment. We also clarify treatment of promotional offerings under price cap regulation and resolve the classification of 800 data base service. [3] We create a new service category in the 800 services basket for use when 800 data base service becomes incorporated into price cap regulation on July 1, 1991. Finally, we decide that changes in Generally Accepted Accounting Principles should be evaluated on a case-by-case basis to determine if exogenous treatment is warranted. We deny the remaining petitions.

2. In the *AT&TPrice Cap Order*, the Commission confirmed the tentative conclusion that incentive based regulation is superior to rate of return for the regulation of certain dominant carriers. The Commission concluded that a system of regulation that "capped" prices, but not profits, of certain companies would provide incentives to those companies to improve management of underlying costs and increase responsiveness to consumer demand. Under price cap regulation, rates AT&T may charge for service are limited for tariff review purposes by a predetermined formula that operates as a benchmark of cost changes AT&T is likely to experience. If AT&T can reduce the change in its actual costs to a level below the change in the benchmark, it is permitted to benefit from improved earnings. Thus, the formula provides AT&T with incentives to reduce its total costs each year to levels lower than existing rate of return regulation could be expected to produce. Consumers benefit under the plan because the benchmark formula requires AT&T to be more productive than it historically has been, and because the incentives within the plan to lower costs will enable AT&T to lower rates.

3. The AT&T price cap plan divides most of AT&T's services into several groups, or "baskets," each governed by its own price cap index.[4] The price cap index is computed with a three-part formula. First, changes AT&T experiences in the costs of factors of production (inflation), as measured by the Gross National Product Price Index, are counted. Second, the amount of inflation is reduced by a 3 percent productivity offset that represents

the difference between AT&T's productivity and the productivity in the economy as a whole (as embodied in the inflation measure), and includes a .5 percent Consumer Productivity Dividend. Third, the formula is adjusted for specific cost changes known as exogenous cost factors that generally result from changes in our rules or from other changes beyond the control of AT&T. Exogenous costs include, for example, changes in the access rates AT&T pays for use of the local network. Compliance with the price cap is measured by a formula known as the Actual Price Index that measures aggregate rates in a basket.

4. There is one price cap index for each of AT&T's three baskets. Baskets are constructed to maximize protection to various consumer and user groups, so that the pricing flexibility permitted under price caps cannot be used to disadvantage one particular group of ratepayers.

5. The first AT&T basket consists of residential and small business services. Services are divided into the following categories within the basket: (1) daytime Message Telephone Service (MTS), AT&T's basic long distance service; (2) evening MTS; (3) weekend and night MTS; (4) international MTS; (5) Reach Out calling plan; and (6) operator assistance and credit card calling.

6. Under the price cap plan, AT&T can qualify for streamlined tariff review for these services as long as the aggregate weighted price for all services does not exceed the price cap. In addition, the Commission imposed other pricing constraints on AT&T's ability to qualify for streamlined treatment. AT&T may raise prices for evening, night, and weekend MTS a maximum of 4 percent per year above the change in the price cap index without triggering more exhaustive tariff scrutiny. Rates in the other service categories may rise no more than 5 percent per year, adjusted for changes in the price cap, to qualify for streamlined tariff review. Streamlined rate decreases are limited to 5 percent per year adjusted for changes in the price cap for all categories in this basket. In addition, to qualify for streamlined review AT&T is required to decrease aggregate residential rates in this basket by 2 percent a year in real (inflation-adjusted) terms, a pricing limit known as the Residential Price Index.[5]

7. The Commission grouped AT&T's remaining services into two baskets, according to an evaluation of the degree of competition AT&T faces in the provision of such services.[6] An 800 Services (inward dialing) basket segregates AT&T's 800 services from the remainder of the business services AT&T provides. The Commission divided 800 services into four service categories: (1) Readyline 800; (2) AT&T 800; (3) Megacom 800; and (4) All Other 800. The final basket consists of all other AT&T business services, which include the most competitive segment of the telecommunications market.[7] Service categories for the business basket consist of (1) ProAmerica calling plans; (2) WATs (outward dialing); (3) Megacom; (4) SDN; (5) Other switched services; (6) voice grade private lines services and below; and (7) private line services larger than voice grade. As is the case with the other baskets, AT&T will not be able to increase or decrease rates in any of these categories or in the 800 or Business baskets more than 5 percent per year adjusted for changes in the price cap, without triggering more comprehensive tariff scrutiny.

8. For all baskets, the Commission provided that should AT&T file tariffs for services that exceed the price bands, the filing will not be eligible for streamlined review on 14 days' notice with a presumption of lawfulness.[8] Rates that exceed either the 5 percent annual limit on price increases for service categories or the limit on upward movement in aggregate residential rates must be placed on 90 days' notice and be justified on the basis that AT&T has substantial cause to make such a filing. Similarly, any rates filed that cause the weighted average of prices for a basket to exceed the cap are subject to an extensive cost support showing to demonstrate that the rates are just and reasonable. These filings will also be placed on 90 days' notice and will likely be suspended. An above-cap filing must be accompanied by an explanation of how AT&T allocated costs among services, and among its various baskets. In order to ensure that precipitous price decreases are adequately scrutinized in the tariff review process for possible anticompetitive effect, the plan provided that below-band filings must be made on 45 days' notice and must be accompanied by a showing that the new rates for the service category cover that category's average variable cost.

9. The Commission also adopted rules regarding AT&T's ability to introduce new services, and to restructure existing services, under a price cap system.[9] New services are defined as any filing that expands consumers' range of options within those services subject to price cap regulation. New services may be introduced on 45 days' notice, provided AT&T can demonstrate that the new service will generate net revenues within 24 months from the incorporation of the new service into an annual price cap tariff or within 36 months after the effective date, whichever occurs first. To develop the historical data needed to perform index calculations for new services, new services will be included in price cap regulation in the first annual price cap tariff filing after completion of the base year in which the new service becomes effective.

10. Services that are within the cap and restructured by AT&T will remain under price cap constraints at all times. Since tariffs that restructure existing services could potentially raise issues of unlawful discrimination or other statutory concerns, such tariffs will be filed on a 45-day notice period.

11. The Commission also decided that several of AT&T's services should be excluded from price cap regulation because some services are structured or priced in such a way that applying a price cap structure to them would be excessively difficult or unnecessary.[10] Services subject to separate accounting requirements, special construction services, Tariff 11 services, Tariff 12, and "custom" tariffs, such as Tariff 15 and Tariff 16 services, shall be excluded from price cap regulation, and remain subject to conventional tariff review procedures.

12. The Commission also affirmed the tentative view, announced in the *Further Notice*, that AT&T's existing rates are a suitable point of departure for the price cap system.[11] The Commission found, for example, that AT&T earned less than its authorized rate of return during the first three quarters of 1988, and that recent investigation of a number of AT&T rates provided sufficient assurance that rates were generally not unlawful.

13. In adopting price caps for AT&T, the Commission restated and renewed the previously articulated Commission policy in favor of geographic rate averaging for AT&T.[12] Other policies and rules of the Commission, such as other market rules, accounting rules, and separations rules, are unaffected by the adoption of price caps. The Commission did, however, decide to eliminate the Interim Cost Allocation Manual for AT&T, that specified

how AT&T's earnings in its interstate regulated operations would be reported. The Commission also found that AT&T's service quality is not likely to decline under price cap regulation, and that in general sufficient monitoring is in place at the federal and state level to detect a decline. However, the Commission pledged to initiate quality of service monitoring in areas where equal access is not yet available.

14. The Commission monitors AT&T operations to ensure that the price cap system is functioning properly. After the third year of price cap regulation for AT&T, the Commission will conduct a comprehensive performance review of the price cap system.

II. STRUCTURE OF BASKETS AND BANDS

A. Lower Bands and Below-Band Filings

15. The *AT&T Price Cap Order* permits AT&T to exercise limited pricing flexibility in setting rates. Aggregate rates in each of the various service categories are generally permitted to increase or decrease 5 percent per year, a feature of price cap regulation known as pricing "bands."[13] The lower band applied to each category is intended to reduce the possibility that AT&T might engage in predatory pricing, cross-subsidization, or other anticompetitive practices.[14] If AT&T proposes rate reductions that will cause aggregate rates to fall to a level more than 5 percent below the levels in effect at the end of the preceding tariff year (adjusted for changes in the price cap), the rate revision must be filed on 45 days' notice and be accompanied by a showing that the rates cover average variable cost in the service category.[15] The Commission did not adopt a proposal described in an earlier Notice not to "credit" below-band price decreases for the purposes of calculating the Actual Price Index (API).[16] By crediting the full amount of the below-band decrease, the API is lowered to reflect the full extent of the decrease.

1. Existence of lower bands

16. Various parties dispute the need for lower bands and the accompanying tariff requirements for below-band filings. AT&T and several large users challenge the need for lower bands and contend that lower bands prevent AT&T from offering consumers lower rates, interfere with competition, and will, if retained, lead to aggregate rate increases.[17] These commenters argue that predation is unlikely given the ease of entry into the interexchange marketplace.[18] These parties also challenge as arbitrary the decision to trigger a cost-based filing requirement whenever service category rates dip at least 5 percent below the levels in effect on the last day of the preceding tariff year.[19] They argue that users prefer rate decreases, not "speculative future benefits" to be derived from applying anticompetitive safeguards that restrict AT&T's downward pricing flexibility.[20] Accordingly, such commenters urge this Commission to abolish the lower bands.[21]

17. While other parties generally support the use of lower bands as a check against potentially predatory activity,[22] they contend that current baskets and bands are inadequate and urge that the baskets and bands be tightened.[23] This group of commenters argues that the use of lower bands as a check against AT&T's ability to decrease prices in an anticompetitive manner reflects a view of predation that is much too narrow. According to these commenters, the baskets and bands created provide AT&T with an opportunity to engage in a range of strategic behavior calculated to discipline actual competition or discourage potential competition.

18. In the *AT&T Price Cap Order*, the Commission imposed lower bands out of "an abundance of caution."[24] In adopting lower bands, the Commission stated a belief that the system of baskets, subdivided into service categories, and limited by upper bands, makes predation in the form of cost-shifting or cross-subsidy unprofitable and unlikely.[25] The Commission recognized that tariff requirements having the effect of slowing AT&T rate decreases could only be justified by a corresponding interest in preserving the future of interexchange competition. The decisions to require lengthier review of rate decreases greater than 5 percent annually, and to review those decreases with reference to AT&T's average variable cost, represent the Commission's effort to balance a desire to see rate cuts that directly and immediately benefit consumers with the need to ensure that competition continues to benefit consumers in the long term.

19. Since that decision was reached, this Commission has initiated a Rule Making to examine the extent of competition for interexchange services.[26] Unlike the price cap proceeding, which assumed *arguendo* the dominant status of AT&T, the *Interexchange Notice* seeks to examine competition in the interexchange market and to enact regulatory reform, if appropriate, to reflect current market conditions. The *Interexchange Notice* tentatively concludes that increased competition for interexchange services warrants new approaches to the regulation of AT&T's services. The *Interexchange Notice* also tentatively finds that competition is particularly well-developed with regard to services that large users employ, a group that includes the Business Services Basket established under price caps. In light of this tentative conclusion, this Commission proposed in the *Interexchange* proceeding to eliminate lower bands for service categories in the Business Services basket.[27]

20. We believe the need for lower bands is an issue that can best be decided in the context of the *Interexchange* docket. The *Interexchange Notice* seeks to develop a record on the state of competition for interexchange services, and notes our tentative views on the economics of predation. The record before us on reconsideration in the AT&T price cap proceeding is limited in comparison to the record we have thus far collected in our *Interexchange* docket. Analysis of the record in the *Interexchange* proceeding will be important in reviewing whether competition is sufficiently rivalrous to eliminate lower bands for the Business basket services, and whether our tentative judgment in that proceeding to retain for the time being lower bands for the other two baskets is the best course. While parties to this reconsideration have made clear their conclusions with regard to these issues, our ability to find the facts that lie at the heart of their judgments should be measurably enhanced by an analysis of the record in the *Interexchange* proceeding.[28]

21. Pending any possible changes that we may adopt in that proceeding, and based on the record evidence in this proceeding, we adhere to the decision to permit AT&T to file rate decreases on a streamlined basis as long as the proposed rate decreases do not cause rates for the service category to drop more than 5 percent per year, adjusted for the change in the price cap index. We reject suggestions that the 5 percent level is either too strict or too

liberal a demarcation point between filings that are streamlined and those that are not. With respect to arguments that 5 percent is too tight a constraint, our experience with price cap regulation thus far demonstrates that below-band filings have represented only a handful of the hundreds of filings AT&T made in its first year under price caps, and that in no case did the tariff requirement ultimately prevent a rate decrease from taking effect.[29] With respect to arguments that a 5 percent price change gives AT&T too much pricing flexibility, we believe that commenters supporting this view place too little weight on the historical movement in interexchange prices[30] and on the cost showing that must accompany a below-band proposal. We will thus retain lower bands of 5 percent at the service category level.[31]

2. Filing requirements

22. A number of parties challenge the average variable cost test established to evaluate AT&T's below-band filings. Such parties claim that the test is so vague as to create a "loophole" for AT&T and prevents the Commission and others from adequately evaluating such filings.[32] These parties argue that this test is not the correct standard to be applied in such cases[33] and that it is not adequately supported by the record in this proceeding.[34] These parties also argue that the infirmities inherent in the test render it unenforceable.[35] This group also tends to view the 45-day notice period as insufficient, while AT&T views the notice period as unnecessarily lengthy.[36]

23. We reject arguments that the Commission lacks an adequate basis to adopt average variable cost as the standard to evaluate below band filings. In both economics and law, average variable cost is a well recognized standard for deciding whether a particular price reduction is potentially anticompetitive.[37] While we recognize that not all economists would endorse average variable cost as a litmus test for predation,[38] we note that our use of this test is for the limited purpose of deciding whether a tariff revision should be suspended or investigated. As many federal courts have recognized for some time, average variable cost provides a meaningful and measurable basis on which to judge prices.[39] And, as we said in the *AT&T Price Cap Order*, parties may be able to demonstrate that a below-band filing should be investigated even if the average variable cost test has been satisfied.[40]

24. We therefore disagree that the average variable cost standard is vague, undefined, or unmeasurable. Economists define average variable cost as the total variable cost of producing a good (or service), divided by the number of units of the good produced. Variable costs are the costs which vary as the amount of the good produced varies. They are distinguished from fixed costs, which are incurred regardless of the level of production. Average variable cost is a basic economic concept, and its measurement is a relatively straightforward task.[41]

25. We wish to clarify, however, that there exist different ways to demonstrate that a service category's rates cover its average variable cost. One way is to present the average variable cost of the service category. Another way is to provide an incremental net revenue showing of the type AT&T provided in its Transmittal 1690.[42] We therefore clarify that the showing provided to meet the average variable cost test can be either an average variable cost showing or the incremental net revenue test used to support Transmittal 1690. We have accordingly amended Section 61.49(d) of our rules to give effect to this clarification.[43]

26. Given that lower bands, as well as the economic definition of predation, are open issues in the *Interexchange* Rule Making, we believe the best course is to continue to apply the average variable cost test, as clarified here, to below-band rates. Similarly, we will not disturb the filing period required for below band tariffs. We are not persuaded by AT&T's argument that the 45-day period hobbles its ability to compete, given the relatively few below-band filings that have been made. We also see no reason to lengthen the notice period for below-band filings. While deferral of the effective date of a tariff for the maximum period remains an option for filings that raise substantial concerns, we do not perceive the need to delay routinely the effectiveness of rate cuts once we have had an opportunity to check for possibly predatory activity.

27. Commenters disagree about the wisdom of giving AT&T full credit in its price indexes for price decreases below the lower band.[44] We decline to adopt the "no-credit" rule suggested by several petitioners. Subject to the existing restrictions on below-band filings, we want to encourage AT&T to lower its rates wherever and whenever possible.[45] Given the structural limitations on AT&T's ability under price caps to cross-subsidize lower rates in more competitive markets with higher rates in less competitive markets, we find that such a rule would discourage rate reductions by AT&T to the detriment of some of its customers without substantial assurance of a corresponding benefit for other customers or for competition in general.

B. Baskets

28. Some petitioners contend that the Residential and Small Business basket and the Business basket should be further divided. With respect to the Business basket, parties argue that private line services should be isolated in two or more separate baskets. With respect to the Residential and Small Business basket, parties argue that International Message Telecommunications Service (IMTS) and Operator and Credit Card services should each have separate baskets.

29. Parties argue that consolidation of switched and private line services within the Business basket permits AT&T to engage in cross subsidization.[46] These commenters argue that AT&T retains market power over many private line services offered in the Business basket. Other parties state that AT&T will be able to migrate customers from private line services to switched services to the detriment of providers of multiplexing and routing equipment normally used in conjunction with private line services.[47] Parties opposing the existing basket structure generally argue that the present structure of baskets and bands provides inadequate protection from the cross subsidization concerns the Commission identified in promulgating baskets and bands.

30. Parties favoring separate baskets for IMTS and Operator and Credit Card services make similar arguments about cross subsidy.[48] These parties also argue that IMTS and Operator and Credit Card services have different operating characteristics that require different treatment.[49] Parties argue that these services do not exclusively serve residential customers, and that the services are not substitutes for other services in the basket.[50]

31. We decline to split the baskets further. In designing AT&T's baskets and bands, the Commission observed that subjecting different groups of services to separate price caps impairs economic efficiency.[51] One cap on all of AT&T's services arguably could generate the most efficient results because prices could be set in the most efficient way to recover company costs, while the cap on prices would drive AT&T to lower those costs through productivity gains. The Commission nevertheless rejected this approach in favor of multiple baskets, each subject to a separate cap, because a single basket would have given AT&T too much pricing flexibility. Multiple baskets, however, raise different complications. Every time a new basket is created, the process of allocating exogenous costs among baskets becomes more burdensome, including the process of ensuring that the correct allocation was made. Moreover, since the productivity offset used in the price cap formula is based on total company productivity performance, application of the same offset to each of several baskets raises concerns about the accuracy of the offset as applied to that particular segment of the firm's operations.[52]

32. Arrayed against this set of concerns are the problems of rate shock and cross subsidization. The Commission recognized that unfettered pricing flexibility might result in sudden and substantial changes in the price of a service. The Commission also expressed concerned that unfettered pricing flexibility might result in potentially anticompetitive pricing actions, since not all of AT&T's services are subject to equal levels of competition.

33. The Commission therefore decided to limit AT&T's pricing flexibility. The Commission first decided to segregate into one basket, subject to its own price cap, those services used by residential and small business customers. The Commission next decided to segregate 800 services due to the existence of structural barriers to full competition in the 800 services market. Finally, the Commission evaluated the remainder of AT&T's services to determine if further segregation would be required. The Commission concluded that additional baskets were not necessary. Unlike the residential basket, there were no further universal service goals to be attained by segregating the remaining business services. Nor did the Commission find institutional barriers to competition of the type associated with 800 services.

34. We do not agree with those commenters that argue that the danger of cross subsidization with respect to less competitive private line offerings is so great as to warrant the creation of additional baskets. Given that institutional barriers to entry of the type found in the 800 market appear to be non-existent, and competition for private line services appears to be growing generally,[53] attempts by AT&T to engage in predation are likely to be met with additional entry in the service that is the source of the subsidy.

35. We also disagree with arguments that IMTS and Operator and Credit Card services do not belong in the Residential and Small Business services basket because they do not exclusively serve residential customers, or are not substitutable for other services in the basket. As AT&T argues, the majority of minutes generated in IMTS are billed to residential accounts.[54] Since the purpose of the residential basket is to ensure that residential subscribers benefit from price cap regulation, and that price cap regulation performs in a manner consistent with our universal service goals, IMTS is properly associated with other services that residential customers use. AT&T is also correct in stating that, for the purposes of calculating indexes, the minutes of international and operator/credit card services generated by subscribers of AT&T's other business services (*e.g.*, Megacom, SDN) are attributed to the Business basket 3 and the relevant service category within that basket.[55]

C. Related Issues

1. Service category bands

36. Petitioners argue that the number of service categories established within the three baskets are too few. Since the categories operate to limit annual prices changes, petitioners argue, more categories are needed to prevent AT&T from engaging in cross-subsidization within the service categories, or across categories.[56] IDCMA argues that the number of categories in the Business basket are insufficient, particularly in light of the narrow categories established in the Residential and Small Business basket and 800 Services basket.[57] Comptel also argues that the Commission's decision to move from its original proposal to band individual rate elements, electing instead to band prices at the service category level, was not explained in the *AT&T Price Cap Order*. Comptel states the Commission should adopt rate element banding constraints.[58]

37. We will not further divide the service categories originally adopted. In the Residential and Small Business basket, there are six service categories. Four of those categories are basic long distance service: day, evening, night/weekend, and international calling. Operator and credit card calling, which are offered in conjunction with the basic schedule offerings, are in a separate category. Reach Out America, an optional calling plan offered as an alternative to basic long distance service, is the sixth category.

38. Inward-dialing 800 services are divided into four categories -- Readyline 800, AT&T 800, Megacom 800, and all other 800 -- reflecting the different types of 800 service AT&T offers. Thus, the first two baskets -- Residential and Small Business as well as 800 Services -- utilize narrowly defined service categories, particularly given the number of services assigned to each. Commenters have not suggested how we would further split the narrow service categories in these two baskets, short of banding individual rate elements. As we discuss, below, rate element banding greatly adds to the administrative burdens associated with price cap regulation, in direct opposition to the Commission's stated goal of easing administrative burdens.[59] We therefore do not believe that further segregation of these categories is necessary or desireable.[60]

39. Similarly, we decline to expand the number of categories in the Business services basket. In selecting the basket and category configuration applied to AT&T's business services, the Commission found that these offerings were subject to the greatest amount of competition. Furthermore, the Commission specifically recognized the concerns parties had expressed with respect to private line offerings, and elected to separate private line into two categories -- voice grade and below, and all other private line.[61] Moreover, the seven service categories in this basket already outnumber the six categories in the Residential basket and the four categories in the 800 Services basket. Given the relative size of the baskets, measured in

terms of revenues, the Business basket is already subject to more service category segmentation than the other baskets.[62]

40. We disagree with parties' arguments that the system of baskets and service categories will contribute to unlawful cross-subsidization. The baskets and categories have been carefully designed to segregate services residential customers use from services businesses use. Subjecting these services to different caps minimizes any incentive to disadvantage particular customer classes. Within the baskets, unlawful cross subsidization is discouraged by the existence of service category bands that permit prices to move up or down 4 or 5 percent a year, but require more exhaustive tariff support if prices rise or fall more extensively. Thus, if AT&T were interested in pursuing a strategy involving predatory pricing of a service, it would have to move prices incrementally downward over several successive years, or be prepared to cost justify a larger price decrease. Furthermore, AT&T remains subject to the complaint process, including allegations that AT&T is offering service at predatory levels.

41. Within a single service category, we believe it would be difficult for AT&T to engage in predation. In most cases, service categories are narrowly enough defined that AT&T could not benefit from lowering rates for some elements to predatory levels while profiting from the charges on other elements. Customers (or potential customers) of the category would see such rate action as a "wash," and would not have a financial incentive to become AT&T customers.

42. Of course, to the extent parties are arguing that price cap regulation allows AT&T to migrate its rates away from fully distributed costing methods and toward market-based pricing, the parties are arguing that they would prefer rate of return regulation. Simply because prices are no longer established by reference to fully distributed costing methods does not mean that the prices represent unlawful cross-subsidization.

43. We also reject arguments to apply bands to rate elements. As the Commission stated in the *AT&T Price Cap Order*, AT&T has over 6,000 rate elements. Collecting banding information at this level of detail would greatly expand the administrative burden on AT&T without offsetting public interest benefits. Given that AT&T's services have been divided into three baskets and 17 service categories, designed to minimize incentives and opportunities for cross-subsidy, we reject the idea that rate element banding is necessary or desirable.

2. Residential price index

44. The *AT&T Price Cap Order* requires AT&T to maintain an index of residential prices as an additional check on changes in rates that residential customers pay. The index measures prices in the Residential and Small Business basket, focusing only on those services that customers actually purchase.[63] AT&T's tariff filings in the Residential and Small Business basket remain eligible for streamlined treatment so long as the residential price index does not increase more than 1 percent per year adjusted for changes in the price cap index. Allnet argues that the pricing protections offered by the residential price index should be fortified by "discount stabilizer factors" that link price movements for evening and night/weekend MTS with the "all other" service category in the Business basket. Allnet argues that the Commission should require AT&T to maintain the rate relationship between the "all other" services category in the Business basket and evening and night/weekend MTS in the Residential basket, so that MTS customers can benefit from declining prices in the Business basket.[64]

45. We disagree that fixed price relationships between AT&T's services assigned to different baskets should be established. Price cap regulation is designed to give AT&T limited flexibility to change prices so long as aggregate prices for the basket remain below the cap, and do not result in increases or decreases beyond the service band limits. This system permits AT&T to migrate its prices incrementally away from prices based on fully distributed costing and toward efficient prices, which the Commission defined as marginal cost pricing.[65] Since different services have different cost and demand characteristics, we expect that the price relationships existing on the day price cap regulation became effective for AT&T would change over time. Allnet's proposal, in contrast, would have us, in effect, declare that the marginal cost and demand characteristics of providing evening and night/weekend MTS are identical to the services offered in the "all other" category of the Business basket. Even if such a relationship existed (and there has been no showing that it does), we are opposed to implementing cross-basket price controls. The baskets selected for AT&T were designed, in part, to recognize different levels of competition and different customer groups. By segregating services in this way, we have minimized the opportunities for cross-subsidization. Creating fixed relationships among prices in different baskets raises regulatory concerns that we have been able to minimize under the current structure.

3. Promotional offerings

46. Promotional pricing activities are not discussed in the *AT&T Price Cap Order*. Two parties request clarification of the treatment promotional pricing activities should receive in a price caps regime.[66] We agree that clarification of the treatment of promotional price changes is needed, particularly in view of AT&T's expanded use of promotions in the last few years.

47. Under price cap regulation, carriers have a profit-based incentive to increase operational efficiency. In addition to cutting costs, one of the principal mechanisms to increase efficiency is to generate additional minutes of use on the network.[67] Promotional offerings are one method of stimulating usage. As long as a promotional offering does not raise discrimination issues or otherwise fail to comply with the Communications Act, we will not limit AT&T's efforts to generate greater network efficiencies by restricting promotional activity.

48. Although we do not seek to inhibit AT&T's ability to offer promotions, we view as a separate question whether promotional price changes should be included in the calculation of the Actual Price Index, Service Band Index, and Residential Price Index. By including promotional price activity in the calculation of these indexes, the value of indexes decreases when a promotion is initiated, giving AT&T additional upward flexibility to raise prices in another service category or rate elements within the same basket. At the time the promotion concludes, the indexes are elevated by the same amount they were previously lowered. We decide that, in general, promotional pricing should not be credited in price index calculations. However, where AT&T makes a simple price change to a rate element, and then markets that price

change in conjunction with a promotion, the rate change can be credited in the price indexes. We explain the reasoning for this distinction, and our decision generally to exclude promotions, below.

49. Price cap regulation is premised on the principle that a regulatory system that rewards efficiency will cause a carrier to lower its per unit costs, and its prices, over time. Under price caps, AT&T is not held to a specific ceiling on its rate of return on investment, and its rates are not based on regulatory cost allocation requirements, such as fully distributed costing. The price cap system for AT&T provides limited pricing flexibility to permit AT&T to migrate prices away from levels established using rate of return methodology and toward a more efficient set of rates.[68] In the *AT&T Price Cap Order*, the Commission specifically rejected a price cap system that would have provided AT&T with unlimited pricing flexibility.[69] Rather than place all of AT&T's services under one cap, services are divided into three individually-capped baskets, and within the baskets, into a total of 17 service categories. Streamlined tariff treatment applies only to simple price changes (*i.e.*, when the dollar amount associated with a rate element is changed and nothing else in the tariff changes) that remain within the cap and within the plus or minus 5 percent pricing bands, as well as within additional limits established by the Residential Price Index.

50. Thus, the regulatory system the Commission established contemplates streamlining only in those cases in which the price of a rate element changes, and that price change does not violate cap and band rules. Furthermore, the system of baskets, service categories, and banding restraints included in the plan ensures that if AT&T's aggregate prices are at the cap or ceiling for the basket, a rate increase in one service within the basket will require a rate decrease somewhere else in the basket. Changes to the tariff other than pure price changes are treated as a restructuring of the existing offering, and must be filed on 45 days' notice. Index credit is given for price changes associated with restructures only after the filing has passed muster in a 45 day review to determine whether the restructure violates Section 202 or any other section of the Act or is otherwise unlawful.

51. Promotions usually involve restructuring of the tariff by creating a sub-class of customers eligible to receive a special, promotional rate for a limited period of time. For example, promotions might be limited to customers in a particular geographic area, to customers that have at least a certain dollar amount of monthly bills, or to new subscribers. While the no-suspension zone created with the basket, band, and tariff filing requirements allows AT&T limited flexibility to realign service category rates, the structure does not contemplate that promotional price changes affecting limited subgroups of ratepayers can be used to create upward pricing flexibility in other services within a basket. In our view, inclusion of all promotional offerings in price caps would grant AT&T an additional degree of pricing freedom not contemplated under the regulatory structure.[70] This additional flexibility, in turn, might also provide additional incentives to engage in promotions because the promotion can provide room to raise rates for other services when the API is at the cap.

52. We therefore find that where AT&T establishes qualifying criteria associated with a promotional offering, including time limits, AT&T will not be permitted to receive credit on its price indexes. This practice ensures that the amount of pricing flexibility AT&T receives under price caps is limited to that resulting from price changes that are available to all.[71]

53. Some promotional activities, however, involve nothing more than a simple price change. We believe that simple price changes, which change the price available to all without establishing time limits or other qualifying criteria, ought to be treated as a routine streamlined price changes under caps, and given index credit. We recognize that AT&T might advertise or market a simple price change as a "limited time" promotional rate, without acknowledging in its tariff that it intends to increase rates in the near future. AT&T would thus obtain index credit for the promotion. None of our price cap rules limits AT&T's ability to "take back" a rate decrease, even after a limited period of time, provided that the revised rate remains within the cap and band limitations.[72] Moreover, because the new rate is available to all, we do not have the same concerns as when AT&T attaches some type of promotional eligibility criteria to a rate element.

54. For those promotional tariffs that are excluded from price cap regulation, we must specify the tariff requirements associated with them. We find that the 14 day notice period normally associated with promotional filings has effectively and adequately balanced the interests of AT&T in responding to marketplace conditions with our interests in enforcing the Communications Act. For the present, we will entertain requests for special permission that allow AT&T to file promotions on 14 days' notice. We will also require these filings to include, for illustrative purposes only, the Actual Price Index values and Service Band Index values that would exist if the promotional offering had been included in price cap regulation. Illustrative indexes are most consistent with our regulatory requirements for capped services, an important feature since these offerings promote services subject to price cap regulation. Use of illustrative indexes also avoids devising burdensome cost allocation systems that price cap regulation seeks to avoid. If illustrative index values reveal that the filing would result in rates that are below band, AT&T will be required to file the additional cost support associated with below band filings.[73] This requirement continues the Commission's practice of ensuring that price decreases do not raise anticompetitive concerns.

55. We believe that this Order should apply to current index levels. We require AT&T to submit in its next tariff filings for each of the baskets, revised Actual Price Index, Service Band Indexes, and Residential Price Index values, deleting any credit for promotions that are currently in effect, and that have received index credit. We take this action because our decision not to credit promotions in the price indexes is intended to clarify the structure of the price cap rules currently in effect. Since our decision is predicated upon enforcing the price cap structure as we believe it was originally adopted, we believe that the clarification should be applied to existing measures of AT&T prices.

56. Our decision to require recalculation of price indexes will affect at least one pending tariff transmittal. Until recently, AT&T had claimed index credit for all price changes associated with promotions. In AT&T Transmittal 2652, AT&T took advantage of the pricing flexibility it had created by virtue of several promotions offered during the latter half of 1990 by seeking a 2.2 percent rate increase for night/weekend rates. That Transmittal remains pending. Once index credit for the promo-

tional offerings is removed, AT&T's aggregate Residential and Small Business basket rates are at the cap; to raise Night/Weekend, AT&T would have to lower a rate elsewhere in the basket or file an above-cap transmittal. We do not believe that our decision to require currently effective promotions to be pulled out of index values will pose a hardship for AT&T.[74] For example, AT&T may, within the price cap rules, raise Night/Weekend rates, provided another rate in the basket decreases so that aggregate rates are below cap. Or, AT&T may choose to make the showing required of an above-cap rate. AT&T also may offer any promotions that are consistent with the requirements of the Act. AT&T may not, however, offset a promotional rate decrease targeted to a subgroup of ratepayers, with a rate increase that all persons taking service under the tariff must pay.

4. 800 Directory Assistance

57. No parties raise the issue of the treatment of 800 Directory Assistance (DA) in the pleadings on reconsideration of AT&T price cap regulation. In the *800 Data Base Order*, the Commission decided that AT&T, as the sole provider of 800 DA service, should tariff its 800 DA offering to ensure that the service is provided on a nondiscriminatory basis.[75] Under the price cap rules, the offering will be incorporated into price caps on July 1, 1991.[76] The *800 Data Base Order*, however, does not provide direction as to either the basket or band treatment for 800 DA once it is incorporated into price caps. Since in this case, basket and band treatment is not obvious, and the monopoly provision of 800 DA by AT&T raises significant issues, we will use this Reconsideration Order to address the issue.

58. We decide that 800 DA service is most closely associated with offerings in the 800 Services basket, and should be incorporated into price cap regulation as part of that basket. We also decide that, due to the monopoly nature of the offering, incorporation of 800 DA into one of the existing service categories would permit AT&T to increase the price of 800 DA service, while decreasing the price of another 800 offering that may be subject to limited competition. We accordingly create a separate service category in the 800 Services basket for 800 DA service. To provide further assurances that rates for 800 DA will remain just and reasonable, we establish an upper 3 percent banding limitation for 800 DA rates.

59. In reaching these conclusions, we have considered a variety of potential treatments of 800 DA service under price cap rules. For example, since 800 DA uses information operators to respond to requests for 800 numbers, we considered placing 800 DA in the Operator and Credit Card service category in the 800 services basket. We decided, however, that 800 DA is a discrete offering for those seeking 800 numbers, and is therefore more closely associated with 800 services. Furthermore, a decision to incorporate 800 DA in the 800 basket is consistent with the attribution for index purposes of operator and credit card calls to the Business basket, when operator and credit card calls stem from a Business basket service.[77]

60. We also decide against including 800 DA in one of the four service categories established for the 800 basket - (1) Readyline 800; (2) AT&T 800; (3) Megacom 800; and (4) all other 800. In the *AT&T Price Cap Order*, the Commission observed that impediments remained to the full development of competion for 800 service, citing the absence of 800 number portability for 800 customers seeking to change to a different interexchange carrier. The Commission also noted that while AT&T's competitors had begun to offer 800 service, the 800 market as a whole was "less competitive" than the market for business services over all. In the present case, no competition for 800 DA exists. Incorporating 800 DA into a service category, such as "all other 800" which includes international calls, would position AT&T to be able to increase its monopoly 800 DA rates, while decreasing its rates for international 800, without breaching the banding limitations established for the category as a whole.

61. We believe the better course is to isolate 800 DA in its own service category within the 800 services basket, and we have amended our rules to create such a category.[78] Separation of 800 DA into its own category ensures that the market power AT&T currently possesses with respect to 800 DA service cannot be leveraged to AT&T's benefit in a service that is subject to limited competition.

62. We have decided to apply a stricter upper band limitation for interstate 800 DA than for other services because of the unique circumstances under which 800 DA is offered. In the *800 Data Base Order*, we expressed concern "about the incentives and market power inherent in a situation in which an 800 service carrier provides the only DA service for the industry."[79] We encouraged parties to continue exploring 800 DA issues in industry fora and to develop alternative solutions that might be superior to existing arrangements. Thus far, no alternatives have been presented to us. This may well reflect a consensus among interexchange carriers that AT&T has been providing satisfactory 800 DA service at reasonable prices.[80] Nevertheless, 800 DA is a service that AT&T is providing on a regulatorily-sanctioned monopoly basis to its competitors in an important, rapidly-growing market. Moreover, the 800 services basket includes services that are considerably more competitive than 800 DA and 800 DA is a component of the other 800 services in the basket. Under the circumstances, we believe we should apply tighter upper band limitations to 800 DA than apply to other services.

III. EXOGENOUS COSTS

63. Exogenous costs are part of the calculation of the price cap index. Once the effects of inflation and the productivity offset have been summed, the effect of exogenous changes -- those beyond a carrier's control and specified by Commission action -- are added to produce a new cap.

A. Access Flow-through Rule

64. At issue in this reconsideration is not the treatment of access charges as an exogenous cost, but the rule that dictates how access charge changes are allocated among baskets. To allocate changes in non-traffic sensitive (NTS) access charges, AT&T must allocate NTS charges among baskets according to the proportion of total base period NTS originating and terminating minutes associated with each basket.[81] AT&T objects to this rule on the grounds that it is not cost-causative and that it will artificially depress the PCI of the Residential Basket.[82] AT&T explains that NTS access costs are not incurred on the basis of *total* minutes, but are incurred on the basis of originating minutes, terminating minutes, and presubscribed lines. AT&T argues that the rule should be changed to permit it to flow through changes in NTS access costs

according to changes in its basket-by-basket payments for access.[83] Other parties argue that the access flow-through rule should be amended to flow through changes to the service category level.[84]

65. We do not share AT&T's view that the access flow through rule fails to allocate the cost changes correctly. The presubscribed line charges AT&T would like us to take into account represent the current mechanism by which federal high cost assistance and lifeline programs are funded -- per presubscribed line charges assessed on interexchange carriers.[85] In adopting a per line charge to finance the high cost and lifeline programs, the Commission replaced a system of high cost recovery in which the costs were recovered through the carrier common line per minute charge. Thus, under the former system, anyone buying carrier common line minutes (switched access) contributed to high cost support. While the Commission decided to separate the high cost fund from carrier common line, creating a high cost presubscribed line charge, the Commission did not intend by its action to shift the high cost burden from all switched access ratepayers to a particular subset of ratepayers. Indeed, it would seem illogical to do so, since all customers of switched access benefit from having the maximum number of subscribers on the telephone network. The effect of AT&T's proposed rule, in contrast, would be to shift additional burdens to ratepayers of AT&T's Residential basket, while shifting burdens away from ratepayers in the 800 and Business baskets.

66. We also find no evidence that the current rule is harming AT&T's ratepayers or its competitors. Under AT&T's proposed rule, increased presubscribed line payments by AT&T to support a growing high cost fund would result in access charge decreases flowing in greater proportion to the 800 and Business Baskets. Stated differently, the current allocator results in PCIs for the 800 and Business baskets that are higher than they should be and a PCI for the Residential basket that is lower than it should be, in AT&T's view. Of course, since the current PCIs for the 800 and Business baskets are substantially above the prices AT&T is currently charging, business customers are not paying more for service as a result of the alleged misallocation. Furthermore, residential and small business customers may benefit from the allocation rule, given that prices for services in the Residential and Small Business basket are at the cap. Since we find no adverse effect stemming from our current rule, we decide to keep the access flow through rule as adopted. We will continue to monitor access flow throughs to see if some other unintended effect results from the current rule.

67. A number of parties argue, for reasons different than AT&T, that the access flow-through rule should be changed. They argue that the flow-through rule confers too much flexibility.[86] They contend that AT&T can engage in cross subsidization by manipulating access flow-through between service categories in any basket and suggest that the rule should be changed to require that access charge changes be flowed through proportionately to service categories.[87] We do not believe that the rule should be changed to require that access charge changes be flowed through proportionately to service categories. Those that advocate this position apparently wish to limit the discretion that AT&T may exercise in allocating its access costs. However, under the present rule, AT&T's ability to manipulate the allocation of its access costs is already limited by the mechanical operation of the rule that requires AT&T simply to add together its access costs and then allocate them according to the proportion of total base period NTS originating and terminating minutes associated with each basket. By inserting a requirement that AT&T must allocate its access costs not only on a per minute basis, but also on a service category basis, we would be creating a regulatory requirement that appears to be at odds with the limited pricing flexibility AT&T is permitted under the price cap rules.

B. Related Issues

1. Treatment of AT&T bypass

68. While changes in the charges AT&T pays for access to LECs' networks results in an exogenous adjustment to its price caps, cost changes that result from an AT&T decision to bypass local networks are not treated as exogenous changes to AT&T's price cap indexes.[88] On reconsideration, the LECs renew their argument that cost changes associated with bypass should also be exogenous.[89] They state that the price cap formula is constructed so that decreases in access costs lower the price cap index (assuming no net change in other formula variables), and argue that in an environment of declining access charges, AT&T can attempt to maintain its price caps at an inflated level by purchasing less access from LECs and replacing access minutes with bypass.[90] According to the LECs, the incentive to keep its price caps as high as possible will drive AT&T to bypass their networks. Moreover, the threat of bypass, they say, will inhibit them from lowering their access prices.

69. We reject the LECs' argument for the same reasons it was rejected in the *AT&T Price Cap Order*.[91] The LECs cite two circumstances in which AT&T would be tempted to maintain artificially high price cap index levels by switching to bypass. In the first scenario, access costs are declining, and bypass costs AT&T more than purchasing access from the LECs. In the second scenario, access costs as a trend are declining, but bypass and access costs are currently the same.

70. The first scenario cited by the LECs would not logically result in AT&T engaging in more expensive bypass for the sake of maintaining its price caps at their current level. Specifically, the LECs do not explain why a carrier faced with a cap on prices -- not profits -- would voluntarily choose to increase its costs, thereby adversely affecting its profit-making potential without some substantial gain in network functionality, quality, or some other parameter. We also reject the logic of the LECs' second scenario since we believe that in an environment where access costs are generally declining, as the LEC argument stipulates, the most rational economic response from AT&T would be to continue to seek out the lowest cost method of provisioning a service. Under these circumstances, AT&T would continue to purchase LEC access.

71. In addition to running counter to the cost incentives inherent in price caps, the LECs' arguments appear unlikely due to the presence of competition in most markets served by AT&T. If AT&T attempted to take advantage of artificially high price cap index levels by raising its prices, customers would be free to seek out one of AT&T's competitors to obtain service. Thus, a more expensive bypass alternative is unlikely to be used in an environment in which AT&T faces competition.

72. As the Commission stated in the *AT&T Price Cap Order*, the bypass scenario presented by the LECs requires AT&T to predict far into the future a number of cost variables that would render a decision to bypass profitable, assuming AT&T could ultimately take advantage of its allegedly "higher" caps.[92] Given the long-term nature of bypass investment, we disagree with the LECs that AT&T could make all its predictions accurately enough to manipulate the price cap formula to its advantage.[93]

73. More importantly, the phenomenon of AT&T bypass of LEC networks is most likely to occur if an alternative access provider, or AT&T itself, offers less expensive or higher quality circuits to and from AT&T's point of presence. We do not believe we should recapture AT&T's cost savings whenever AT&T develops a way to keep its costs below the PCI. Indeed, the very purpose of price cap regulation is to provide strong incentives for AT&T to become more efficient in the provision of common carrier services.[94]

2. USOA/GAAP changes

74. The *AT& T Price Cap Order* made changes in Generally Accepted Accounting Principles (GAAP), brought about by action of the Financial Accounting Standards Board, exogenous if the Commission approves the change as compatible with its regulatory accounting needs.[95] One party disputes this treatment, arguing that it will result in double-counting of costs changes already reflected in the Gross National Product Price Index (GNP-PI).[96] It argues that GAAP changes should be considered exogenous only on a case-by-case basis where the effect of a GAAP change is unique or disproportionate to the carrier.

75. We agree with the DC PSC. As we have recognized in the case of tax law changes, GAAP changes should be eligible for exogenous treatment after a case-by-case review indicates that the change will not be adequately reflected in the GNP-PI.[97] Thus, AT&T must demonstrate that a GAAP change it seeks to treat as exogenous will not be double counted in the Price Cap Index, once in the GNP-PI and once as an exogenous cost.[98] In deciding to treat GAAP changes as exogenous on a case-by-case basis instead of automatically treating them as exogenous, we must also revisit the rationale found in the *AT&T Price Cap Order* supporting the original decision. That *Order* stated that it is "not always clear" that GAAP changes have the same effect on carriers as on industry generally.[99] Upon reconsideration, we decide that we should take more seriously the absence of clarity on the question of possible double-counting, and evaluate GAAP changes on a case-by-case basis.

IV. TARIFF ISSUES

76. In the following section, we discuss the tariff filing requirements developed for AT&T in the *AT&T Price Cap Order*. Issues relating to the filing requirements associated with below band filings have been addressed in the previous section of this Order dealing with lower bands.

A. New and Restructured Filings

77. In the *AT&T Price Cap Order*, the Commission recognized that new and restructured services need to be integrated into AT&T's price cap system and that, although they could be a potential source of innovation and healthy competition, they also could be a potential source of anticompetitive behavior and discrimination. Accordingly, the *AT&T Price Cap Order* required that both new and restructured services be filed on 45 days' notice, that new services satisfy the net revenue test, and that restructured services satisfy existing cap and band limitations.[100] AT&T argues that all new and restructured filings should be accorded streamlined tariff review on 14 days' notice and a presumption of lawfulness. AT&T contends that too few of its filings qualify for streamlined treatment, that the resulting delay unfairly disadvantages it relative to its competitors, and that other safeguards inherent in price cap regulation and other Commission rules prevent or remedy any harm from streamlining these new and restructured filings.[101]

78. We decline AT&T's request to streamline all new and restructured services. These filings can present important and controversial issues, notwithstanding their compliance with the applicable price cap requirements, and they may require more scrutiny than is afforded by 14 days' notice. AT&T's concern, that its ability to compete in the marketplace is being hampered by these rules, is an issue that is being explored in the context of our *Interexchange* proceeding.[102]

79. We do find, however, that clarification of certain portions of the *AT&T Price Cap Order* in this context will enable AT&T to obtain streamlined treatment for some types of its filings that until now have been defined as "restructured" and subjected to the longer notice period. Our action here constitutes an administrative refinement rather than a major change of policy or substance in the AT&T price cap regime. The subcategories clarified here will still be required to comply with the cap and band restrictions. But the 45 days' notice period will no longer be required, and the filings will be treated in the same way as simple repricing.[103]

80. Our price cap plan for AT&T is founded on creation of a no-suspension zone for tariff filings falling within applicable cap and band limitations for the baskets and services in question. For a transmittal to fall within the no-suspension zone, it must do no more than reprice an existing service in effect in the base year, produce an Actual Price Index (API) value below the applicable cap, and produce a Service Band Index (SBI) value that is no more or less than 5 percent different from the SBI in effect on the last day of the preceding tariff year, adjusted for any changes in the value of the price cap.[104] In the case of both the API and SBI, index values are the product of three variables -- existing price, new price, and historical base year demand. Thus, the no-suspension zone is set by reference to quantifiable, tangible data -- prices and quantities.

81. New or restructured filings can contain extensive provisions expressed in language that theoretically could present issues of predation, discrimination or other abuses, notwithstanding compliance with the applicable net revenue test or caps and bands. These issues do not fit neatly within a price cap no-suspension zone bounded by limits that are set by price and quantity variables. For this reason, the Commission elected not to give new and restructured services streamlined treatment. Yet, based on our experience under price cap regulation, we now believe some restructures are so simple and straightforward that they generally will not raise the kind of issues the Commission was concerned about when it created these categories. It would be in the public interest if we could

refine and clarify our rules to streamline more of the routine filings while continuing to focus on the difficult ones. To this end, we now clarify our rules such that the following three types of filings can be accorded streamlined tariff review.

82. The first type consists of a restructured filing that in effect only adds the availability of a service or technological function to a geographic location. Such a filing does not involve a recalculation of prices or base period quantities and therefore does not affect the actual price index or service band index at the time the change is made. Moreover, this type of filing tends to be straightforward and uncontroversial. Since the addition of a service or technological function to an area does not result in changed index levels and does not appear to raise concerns under the Communications Act, we believe that the public interest is best served by permitting AT&T to add services or technological functions to a geographic area on 14 days' notice with a presumption of lawfulness. As is our current practice, we will not require AT&T to file index information with these filings since no changes to indexes are effected.[105]

83. The second type consists of a restructured filing expressed partially or wholly as a language change that simply eliminates one or more rate elements in a manner tantamount to a repricing to zero.[106] Such a filing involves relatively simple recalculations of indexes based on the new price --$0 -- and does not require amendment of base year demand, as more complex restructures do. Provided AT&T's tariff change falls within applicable cap and band limitations, we believe that these filings should be permitted to be effective on 14 days' notice with a presumption of lawfulness.[107]

84. The last type consists of a restructured filing expressed partially or wholly as a language change that alters the volume discount structure of a single service in a single basket, wherein both the beginning and endpoints of the taper do not change. When (1) a single taper point within the range is split into two or more taper points; (2) two or more taper points within the range are condensed into a single taper point; or (3) taper points within the pre-existing beginning and end points are amended, we will treat the filing as a simple reprice.

85. In making this determination, we are aware that, unlike the clarifications discussed above, realignment of a volume discount taper within a fixed range does involve recalculation of base year quantities. The issue to be faced in calculating new index levels is to formulate base year demand as if the restructured volume discount plan had been in effect in the base year. However, unlike more complex restructures that involve estimation techniques, realignment of base year demand for the volume discount structures we describe is simple -- since AT&T knows from its customer billing records the number of minutes sold to each customer in the base year, it simply reassigns customers to the restructured taper points as applicable. Since we are limiting this exception in our restructure rule to cases in which the beginning and end points of the volume discount do not change, we believe that a 45-day notice period is not required for what amounts to a repricing.[108] If the volume discount change meets the qualifications described above, and falls within applicable cap and band limits, it may be filed on 14 days' notice with a presumption of lawfulness.

86. Several parties criticize the net revenue test for new services, and suggest modifications or clarifications to it. Cable & Wireless contends that this test should be applied only to the net revenue of the service in question, not to the net revenue sum for all three AT&T price cap baskets, as the *AT&T Price Cap Order* requires.[109] Cable & Wireless also maintains that there should be an explicit requirement that the revenue used in the test should not be based on price increases in other services.[110] As we concluded in the *AT&T Price Cap Order*, [111] however, revenues from all three baskets must be considered to reflect cross-elasticities of demand for services among them. We therefore reject this argument. But Cable & Wireless is correct that only revenue changes stemming directly or indirectly from the proposed filing should be considered, in the sense that all other variables should be held constant when the test is calculated.

87. TLD argues that AT&T should have to meet the net revenue test, not only in preliminary projections at the introduction of the service, but also throughout the entire initial pre-price cap period of up to three years, in the form of a fixed price floor for that duration.[112] In the *AT&T Price Cap Order*, the Commission required that AT&T file quarterly reports comparing actual operating results with projections, beginning six months after the initiation of the new service. The Commission further stated that reports will help us to monitor whether a new service is increasing or is likely to increase net revenues, and to decide whether action on our part is necessary.[113] We believe TLD's concern is adequately addressed by our ongoing monitoring process.

88. Finally, US Sprint advocates imposing separate caps on new services that are "merely discounts from existing services," in order to prevent cross-subsidy and excessive pricing.[114] If we were to accept US Sprint's argument, we would have to treat some services as "restructured" offerings when they are simply different versions of an existing service. Under our current rules, we treat as "new" any service that expands the customer's range of options. We find that the distinction made by the current rule is administratively easier than the version suggested by US Sprint. In addition, the net revenue test we apply to new services already sufficiently addresses the possibility of cross-subsidy.

B. Within-Band Filings

89. Tariff revisions that result in an actual price index below the applicable cap and a service band index within the band limitations are accorded streamlined tariff review, effective on 14 days' notice and accompanied by a presumption of lawfulness with respect to suspension.[115] These filings "must be accompanied by supporting materials sufficient to establish compliance with the applicable bands, and to calculate the necessary adjustments to the affected APIs and SBIs.[116] To make these calculations, AT&T develops a series of price ratios for each rate element, by dividing the existing price for the element into the proposed price. The resulting ratio is then weighted according to demand for that element in the base year (the year ending six months before the most recent annual price cap filing).[117] Commenters argue that the Commission should require AT&T to reveal cost and demand information for each rate element. Parties argue that cost data are necessary to verify the reasonableness of the rates, while demand data are necessary to verify index calculations.[118] IDCMA further argues that the Commis-

sion has failed to enunciate any clear standard by which we will evaluate the reasonableness and lawfulness of a challenged within-band filing.[119]

90. We reject petitioners' arguments. Cost data provided at the rate element level of detail has never been required by the Commission as a matter of course, even under the rate of return regulatory system. Under rate of return, we exercised our statutory responsibility by evaluating service costs, rates, and projected demand. In a price cap system, we continue to evaluate costs, but on a different basis. Under price cap regulation, we track and index aggregate cost changes with our price cap formula to ensure that AT&T's proposed rates are reasonable. Our decision to forgo collection of service cost information for within-band filings, and to rely on indexes, is a necessary predicate for creating the kinds of incentives that will drive productivity increases resulting in consumer benefits. By severing the link between service costs and rates, and refocusing our attention on measuring changes in aggregate costs, we explicitly reject the type of debate the parties seek to continue -- whether a given service or rate element is "too high" by rate of return standards. We believe the trade-off we have made will result in a significant net benefit to consumers, who will see rates continue to drop on an inflation-adjusted basis, while AT&T becomes more productive.

91. Although we have created a "no-suspension" zone for within-band filings, it is still possible to suspend a within-band filing.[120] As the *AT&T Price Cap Order* stated, evidence of several rate increases in succession for a particular service, discriminatorily high increases for certain services, or precipitous decreases having an anticompetitive effect are examples of the type of showing that would likely warrant our requiring AT&T to come forward with additional information about a proposed rate.[121] Arguments that suggest the price cap structure does not enable petitioners to challenge rates they perceive are unjust, unlawful, or discriminatory therefore do not reflect the plain language of the *Order* that it is possible to overcome the presumption of lawfulness attached to within-band, within- cap filings. Moreover, even if rates are permitted to go into effect, they can be challenged in a Section 208 complaint proceeding.

92. We also find that the rate element demand data used to construct the actual price index and service band index need not be filed with each proposed tariff. Historical quantity data is the type of data that is available from business records AT&T routinely keeps. As AT&T argues, this information may also be competitively sensitive. In the process of computing the indexes, historical base year quantities are simply multiplied by the publicly-available prices to develop the indexes. The process of checking the accuracy of the indexes is therefore a simple matter of ensuring that AT&T has correctly multiplied the quantity times the price ratio for each rate element.[122] Given the possibly competitively sensitive nature of this information, and the voluminous workpapers AT&T would have to file to show that it has correctly multiplied the price and quantity data for each of approximately 6,000 rate elements, we do not believe that AT&T should be required to disclose rate element demand when it files a within-band rate.[123]

C. Above-Band Filings

93. Parties argue that the substantial cause test established to review above-band filings is vague and subject to divergent interpretations.[124] Whenever a tariff revision would result in AT&T driving its service band index above the applicable band limitation, while remaining below the cap for that basket, the transmittal is subject to 90 days' notice, with a likelihood of suspension.[125] To support an above-band filing, AT&T is required to demonstrate that "substantial cause" exists to allow the increase to take effect.[126] The test requires a persuasive showing by the carrier that there is some causal relationship between the service for which the increase is sought and the need for increased revenue, and that this outweighs the ratepayers' legitimate expectations that such an increase would not occur.[127]

94. The vagueness arguments raised by parties on reconsideration have been raised and addressed in the *AT&T Price Cap Order*.[128] We believe the test selected properly balances the relevant interests: on one side, it weighs the legitimate expectations of ratepayers created by the price cap plan that the rate for a given service will not rise by more than 5 percent per year; and on the other side, it weighs the carrier's profferred explanation for obtaining the entire needed revenue increase through an above-band increase in just that one service rather than through several within-band increases in other related services in that basket. As the *AT&T Price Cap Order* acknowledges and Pactel argues, the customers' justifiable expectation based on the 5 percent upper band limitation is sufficiently weighty to require the carrier to come forward and meet the higher burden reflected in the substantial cause test.[129]

95. We will, however, make one adjustment to the above-band filing requirements. At the time the Commission adopted price cap regulation for AT&T, the maximum statutory notice period for tariff filings was 90 days. The statutory maximum has since been extended to 120 days.[130] In the *AT&T Price Cap Order*, the Commission stated that it would require above-band rates to be filed on the then-existing maximum notice period of 90 days, in recognition of the potential volume and complexity of the support material accompanying the filing.[131] In fact, the Commission noted that it was prohibited from adopting notice periods longer than 90 days under the then-existing provisions of the statute.[132] Now that the statute permits a 120-day notice period, we amend our price cap rules to require that above-band rates be filed on 120 days' notice.[133]

D. Above-Cap Filings

96. On reconsideration, two parties raise the issue of filing requirements associated with above-cap tariffs. The parties argue that the filing requirements and associated burdens have not been fully specified, and that in their present state of incompleteness, the requirements provide an easily accessible "escape route" for AT&T should it decide price cap regulation is too stringent.[134] The price cap rules state that when a proposed tariff would result in an actual price index above the applicable cap for the relevant basket, the tariff will be subject to 90 days' notice, will likely be suspended for 5 months, and must be accompanied by extensive supporting cost data. This showing would require data on revenues and allocation of costs over the most recent four years at the rate element level for the entire basket of the service involved, as well

as additional information regarding the carrier's other baskets.[135] Scrutiny of the justness and reasonableness of the increase would be extensive.[136]

97. Ad Hoc argues that, although the *Order* describes what kind of materials must be submitted in support of an above-cap filing, the Commission does not identify what this information must prove, what standard of proof will be applied to it, or how it will be used to determine a zone of reasonableness for the service rates involved.[137] Ad Hoc contends that the burden imposed on AT&T by this rule for above-cap increases is less than that imposed on potential petitioners for suspension of within-cap filings, and that AT&T's standard here ought to be the most stringent one of showing of unconstitutional confiscation.[138]

98. The *AT&T Price Cap Order* stated that the supporting data for a proposed above-cap rate increase would be extensive and that the burden of proof that it was just and reasonable would be extremely heavy, greater than under traditional rate of return regulation. This heavy burden is the complement of (or counterpart to) the relatively limited requirements for within-cap, within-band filings, and therefore is an integral part of a regulatory system that encourages AT&T to file prices that are within the "no-suspension zone." As Pactel and PRTC state, our evaluation of detailed cost support and revenues is crucial to our ability to judge whether the proposed above-cap rates are just, reasonable, and nondiscriminatory, the ultimate statutory review standard we must apply.[139] An above-cap filing will require an evalution of a carrier's costs, both investments and expenses, including an evaluation of a reasonable cost of capital. While it is true that written explanations of what occurred are important (*i.e.*, the price cap formula resulted in confiscatorily low rates or created a situation that could lead to service quality deterioration), we see no need to specify in advance a list of circumstances that would support an above-cap rate.

V. OTHER ISSUES

A. Structure of Price Cap System

1. Productivity offset

99. Based on various studies and indexes of telecommunications industry productivity, the Commission found a long-term historical 2.5 percent differential between productivity of the telecommunications industry and that of the economy as a whole, and adopted a productivity offset of 3 percent to reflect a .5 percent productivity dividend for consumers.[140] The Commission then examined AT&T's productivity in the post-divestiture period by indirectly measuring productivity using a price analysis. Since the study confirmed a 2.5 percent productivity differential, the Commission elected to use 2.5 percent as the basis for its selection of a 3 percent productivity offset for use in the price cap formula. One party argues that this number is too low and is founded on inadequate data and a flawed analysis of the record.[141] It states that had the Commission given greater weight to evidence other than the flawed post-divestiture study, the historical differential used as a basis for the offset would be 3 percent, not 2.5 percent. This party argues that better total factor productivity data is required for the selection of an offset.

100. We continue to believe that a 3.0 percent productivity differential, grounded in a 2.5 percent long term historical differential, is the best available predictor of AT&T's future productivity gains that we can expect as a minimum during the first four years of price cap regulation. Of course, price cap regulation requires AT&T to improve its productivity performance above historical levels, since the 3 percent offset is set with reference to a historical, achieved 2.5 percent productivity performance. We disagree that selection of a 2.5 percent historical "baseline" understates AT&T's historical productivity performance. The numerous studies and indexes identified in the *AT&T Price Cap Order* support a differential of between 2 and 3 percent.[142] While some productivity measures are higher than 3 percent, those do not represent a differential measure of telecommunications productivity and that of the economy as a whole.[143] We also disagree that additional total factor productivity measures are required to confirm the selection of a 2.5 percent offset.[144] One of the principal studies on which we relied -- the Christiansen study -- is a long term total factor productivity study of AT&T. While post-divestiture total factor productivity studies of AT&T are not available, other indirect measures of productivity (including the Commission's own price analysis in Appendix C of the *AT&T Price Cap Order)* are available for the post-divestiture period that confirm prior total factor productivity results.[145]

101. Our decision in the LEC price cap proceeding to employ a 3.3 percent productivity offset, or a 4.3 percent offset if the LEC decides to elect a higher offset, does not require us to raise the productivity offset for AT&T. The LEC productivity offsets were set in reference to specific studies of LEC interstate access productivity in the post-divestiture period.[146] Studies of interstate access price performance do not capture the productivity performance of AT&T. This is particularly true with respect to the Appendix C study attached to the *LEC Price Cap Order*, which uses the very different price cap formula for the LEC common line basket in its calculation of a post-divestiture productivity performance.

2. Use of existing rates

102. In the *AT & T Price Cap Order*, the Commission concluded that AT&T's existing rates at the outset of price caps would be the most appropriate basis for setting initial index levels because, *inter alia*, these rates already had been investigated and had in many cases resulted in underearnings.[147] The Commission also rejected conducting a full rate case before using such existing rates to initalize price caps because, *inter alia*, it would prolong arbitrary cost allocation methodologies and delay the benefits of incentive regulation.[148] On reconsideration, Ad Hoc argues that the Commission must prescribe price caps as just and reasonable under Section 205 of the Communications Act, including existing rates as the initial basis for them. Ad Hoc also claims that a full rate case for this purpose would be feasible and not unduly prolonged or burdensome.[149] Maryland PC/NASUCA simply asserts, without elaboration, that the *AT&T Price Cap Order*'s given reasons for using existing rates as the initial basis for price caps are insufficient.[150]

103. The *AT&T Price Cap Order* addressed at length the question of the Commission's legal authority for establishing price caps, concluding that prescription under Section 205 of the Act is unnecessary.[151] We believe this analysis is dispositive of Ad Hoc's contention here. As the Com-

mission stated in the *AT&T Price Cap Order*, the price cap rules do not establish the lawfulness of rates, nor prohibit the filing of nonconforming tariffs. Price cap regulation for AT&T represents only a tentative dividing line between reasonable and unreasonable rates for the limited purpose of reviewing tariffs. The other arguments by Ad Hoc and Maryland PC/NASUCA add nothing new to persuade us to reconsider our conclusions in the *AT&T Price Cap Order*, and we will not do so.

3. Existing services: inclusions and exclusions

104. One party has questioned how the Commission will determine whether rates for services excluded from price cap regulation are just and reasonable.[152] Price cap regulation of AT&T excludes several categories of services: (1) special construction; (2) services offered under Tariff 11, Tariff 12, Tariff 15, and Tariff 16; and (3) new services that are temporarily held outside of price caps.[153] While the *AT&T Price Cap Order* requires AT&T to allocate costs between price capped and excluded services on a consistent and cost-causative basis,[154] the issue raised on reconsideration is whether more specific cost allocation guidance is necessary to ensure that rates for excluded services are just and reasonable.

105. We do not believe additional cost allocation rules are necessary. Excluded services are subject to traditional tariff review, while new services that are temporarily outside of price caps are subject to a specific requirement that AT&T file cost data.[155] AT&T also reports cost and revenue data for excluded services as a group on a quarterly basis through Commission-mandated ARMIS reporting. Given that these other safeguards exist, and price cap regulation itself helps to deter cost-shifting, we find no basis for imposing additional cost allocation requirements for excluded services.

106. In addition to the cost allocation issue, one party argues that the exclusion of Tariffs 12 and 15 from price caps permits AT&T to evade the price "floors" established for capped services.[156] By offering a service in the guise of Tariff 12 or 15, the argument states, AT&T can lower rates below the 5 percent annual limit as it sees fit. We disagree with the premise of the argument. Under price cap regulation, AT&T is free to lower its prices to whatever level it desires, provided that, if the new price is more than a 5 percent annual decrease, cost support data is required as a check against predation. Similarly, when AT&T files Tariff 12 or 15 rates, it must provide cost support demonstrating that the proposed rate covers service costs. Furthermore, both types of filings are normally made on at least 45 days' notice. We therefore fail to perceive how exclusion of Tariff 12 and 15 creates an opportunity for "evasion" of our rules.

4. Monitoring

107. Various parties argue that the Commission needs to specify now what criteria it will use in its evaluation of AT&T's performance under price cap regulation. Specifically, these parties argue that unless we announce in advance the outer bounds of earnings levels that would cause us to amend the price cap formula as a result of the performance review, those parties cannot endorse the monitoring and performance review as an effective device to correct any possible misjudgments.[157] We find that announcing in advance the earnings level that would cause us to reconsider the productivity factor as part of the performance review creates a variety of problems that are not outweighed by the benefits of an early announcement.

108. The performance review, scheduled to begin after the third year of price cap regulation for AT&T, is intended to be a comprehensive evaluation of AT&T's performance under price cap regulation, as well as the performance of the plan itself.[158] Among the items for review are actual price performance, earnings levels, quality of service, and technological progressiveness. The *AT&T Price Cap Order* serves notice that adjustments to the regulatory system, including the size of the productivity offset, may be made as a result of the review. Articulating in advance that a particular level of performance will lead to some associated adjustment to price cap regulation is problematic. For example, a decision to enlarge the productivity offset as a result of AT&T's earnings performance needs to take into account AT&T's earnings over the entire price cap period. As the *AT&T Price Cap Order* states, modest changes in earnings should not be enough to cause the productivity factor to change -- the earnings experience must be substantial and persistent. In addition, we would want to evaluate earnings information in light of prevailing economic conditions to provide some framework for our judgment that earnings were above acceptable levels. Moreover, naming in advance an earnings level that would trigger an increase in the productivity offset would create incentives for AT&T to manipulate its actual earnings to a level below the announced mark, through increased depreciation levels or other means.[159]

109. Petitioners raise two other issues related to the Commission's decision not to name an earnings level that would trigger a productivity adjustment. First, parties argue that the decision to eliminate the Interim Cost Allocation Manual (ICAM) that assigned costs to broad categories of service should be reversed. Without ICAM, these parties argue, an above-cap filing would be supported by a cost allocation method of AT&T's own choosing, and services outside of price cap regulation cannot be adequately monitored.[160] Second, parties argue that the decision to eliminate application of the mandatory Part 65 rate of return profit ceiling was in error, since the rate of return will be relevant in evaluating above-band and above-cap filings, as well as evaluating earnings for the performance review.[161]

110. We reject both sets of arguments. ICAM was a product of a proceeding begun in 1979 to develop cost allocation methods for AT&T.[162] The four broad categories created for use in the ICAM were designed to fit the regulatory needs then prevailing under rate of return: ENFIA, MTS, WATS and Private Line. Below these broad levels, AT&T was simply directed to allocate costs according to principles of fully distributed costing. These categories do not mirror the system of baskets created for price cap regulation. For example, the Business basket contains a mixture of switched and private line services. More important than the mismatch of ICAM categories and price cap categories, one of the fundamental objectives of price cap regulation is the elimination of artificial cost allocation requirements and their effect on prices.[163] By creating a system that caps overall prices, while allowing pricing flexibility within a "no-suspension zone," we create the opportunity for AT&T to realize a more effi-

cient pricing system. Elimination of ICAM furthers this goal by removing a measure of costs that is linked to the former, rate of return cost allocation methods.

111. Similarly, elimination of the rate of return ceiling on AT&T profits is essential to implementation of a price cap regime. The increased risk a price cap carrier experiences, by virtue of the requirement that it must improve productivity in each and every year to keep pace with the price cap formula, requires a reward. We expect that if AT&T takes advantage of its opportunity to outperform the productivity hurdle, its earnings will exceed those available under rate of return.

B. Geographic Rate Averaging

112. Despite the Commission's specific reassurance in the *AT & T Price Cap Order* [164] that the Commission would preserve geographic rate averaging, several parties express concern that this policy directive is insufficient to protect their interests. Two parties renew an argument made in prior rounds to put in place specific regulations requiring geographic toll rate averaging.[165] Another party argues that the price cap banding rules are too flexible and improperly allow AT&T to geographically deaverage its rates by manipulating rate element levels.[166]

113. We reaffirm that implementation of price caps for AT&T does not place our geographic rate averaging policies at risk. As the Commission stated in the *AT&T Price Cap Order*, the incentives for AT&T to engage in geographic rate deaveraging have been greatly reduced by the Commission's access charge policies that have substantially lowered and stabilized the rates AT&T pays for LEC access. Programs such as the High Cost Fund, designed to "spread out" the cost of providing service in high cost areas among all interexchange carriers, further reduce AT&T's incentives to deaverage. Moreover, any effort AT&T might make to deaverage its rates would have to be done in the context of a public tariff filing. The *AT&T Price Cap Order* stated that any filing that proposed geographically deaveraged rates would be subject to the full 90-day notice period then permitted under the Communications Act, would be suspended for the full 5-month period the Act permits, and would be investigated.[167] Based on these safeguards, we do not believe that specific regulations requiring geographic toll rate averaging are necessary.[168]

114. We also do not believe that the pricing flexibility inherent in a price cap system must be tightened to avoid geographic deaveraging. While AT&T is free to adjust rates associated with mileage bands, the present configuration of AT&T's tariffs generally does not link mileage bands to particular geographic locations. Rates for calls of 1,000 miles in length are the same whether the call originates in a rural community or a large urban center.[169]

C. Impact on State Regulation

115. Two parties seek reconsideration of the Commission's judgment that price cap regulation of AT&T in the interstate jurisdiction will not result in AT&T shifting costs to the intrastate jurisdiction. These parties argue that AT&T will have the incentive to shift as much of its interstate costs as possible to intrastate activities thereby inflating profits in both jurisdictions.[170] We disagree with commenters' arguments that regulatory monitoring of the jurisdictional separations process will fail to detect cost shifting for those states remaining under rate of return. Only approximately 15 percent of AT&T's non-access costs are intrastate.[171] A shift upward in the costs of providing intrastate services can be detected at the state level through state rate cases and, at the federal level, through our ongoing monitoring of AT&T in conjunction with the ARMIS system. Where states have eliminated profit caps on AT&T's intrastate offerings, AT&T does not benefit from cost shifting. The *AT&T Price Cap Order* noted that 20 of the 42 states in which AT&T provides intrastate services no longer employ rate of return methods.[172] Thus, AT&T's opportunities to shift costs are rapidly diminishing.

D. Service Quality

116. Only one party, DC PSC, challenged the *AT & T Price Cap Order*'s extensive dicussion of the existing and planned measures by both the Commission and AT&T itself to ensure that price cap regulation does not cause service quality on the network to decline.[173] DC PSC claims that the Commission should reconsider its decision not to establish its own standards and enforcement procedures, in lieu of increased monitoring.[174] We adhere to the view that Commission-established service quality standards and enforcement procedures are not necessary at this time. Price cap regulation creates strong incentives for AT&T to maintain and improve service quality on its network. Unlike rate of return regulation, price cap regulation does not insulate AT&T from a decrease in demand that would occur if service quality declined, and customers departed for higher quality service providers. Under price cap regulation, a decline in demand would simply result in less revenues for AT&T and would not affect the ceiling on AT&T's prices. Furthermore, this Commission collects a variety of information on quality of service, including ongoing reports monitoring AT&T network service quality, annual facilities authorization reviews, Form M reports, subscriber complaints, and service quality standards contained in AT&T tariffs. Of course, as the *AT & T Price Cap Order* states, should our monitoring detect a degradation in AT&T service quality, initiation of quality standards and enforcement procedures would be among the remedial steps we would consider.[175]

VI. ORDERING CLAUSES

117. IT IS HEREBY ORDERED, that pursuant to Sections 151, 154(i) and (j), 201-205, 303(r) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r) and 405, the petitions for reconsideration, partial reconsideration and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

118. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 4 (j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), and 403, that Sections 61.42(b)(2), 61.42(c)(3) and (4), Section 61.49(d), and 61.58(c)(2) and (3) of this Commission's Rules, 47 C.F.R. §§ 61.42(b)(2), 61.42 (c)(3) and (4), 61.49(d), and 61.58(c)(2) and (3) ARE AMENDED and that Part 61 of this Commission's Rules ARE FURTHER AMENDED by adding Sections 61.42(c)(5) through (8), 47 C.F.R. §§ 61.42(c)(5) through (8).

119. IT IS FURTHER ORDERED that the motion to accept late-filed reply comments submitted by the Competitive Telecommunications Association is GRANTED.

120. IT IS FURTHER ORDERED that this Memorandum Opinion and Order and the rule amendments adopted herein shall be effective 30 days after publication in the Federal Register, except that the new Section 61.42(c)(7) shall become effective immediately upon publication in the Federal Register.[176]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The following parties filed Petitions for Reconsideration:

Ad Hoc Telecommunications Users Committee (Ad Hoc)

Allnet Communications Services, Inc. (Allnet)

American Petroleum Institute (API)

American Telephone & Telegraph Co. (AT&T)

Bell Atlantic Telephone Companies (Bell Atlantic)

Cable & Wireless Communications Inc. (Cable & Wireless)

Competitive Telecommunications Association (Comptel)

District of Columbia Public Service Commission (DC PSC)

Independent Data Communications Manufacturers Association (IDCMA)

Maryland People's Counsel and National Association of State Utility Consumer's Advocates (Maryland/NASUCA)

MCI Telecommunications Corporation (MCI)

National Telephone Cooperative Association (NTCA)

National Telecommunications Network (NTN)

Pacific Bell and Nevada Bell (Pactel)

Puerto Rico Telephone Company (PRTC)

Tele-Communications Association (TCA)

Telefonica Larga Distancia de Puerto Rico (TLD)

US Sprint Communications Company (US Sprint)

The following parties filed Oppositions to the Petitions:

ADAPSO (Adapso)

Ad Hoc

Allnet

AT&T

Ameritech Operating Companies (Ameritech)

Aeronautical Radio, Inc. (Arinc)

Bell Atlantic

BellSouth Corporation

Comptel

Hawaii (Hawaii)

MCI

NTN

Pactel

PRTC

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)

TLD

United States Telephone Association (USTA)

US Sprint

The following parties filed reply comments:

Ad Hoc

Allnet

API

AT&T

Bell Atlantic

Cable & Wireless

Comptel

IDCMA

MCI

NTN

Pactel

PRTC

TCA

TLD

US Sprint

APPENDIX B

Amendments to the Code of Federal Regulation

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.42 is amended by revising paragraphs (b)(2) and (c)(3), redesignating (c)(4) as (c)(8), and adding new (c)(4), (5), (6), and (7) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(b) * * *

(2) The 800 service basket shall contain such services as the Commission shall permit or require, including the following service categories:

(i) Readyline 800;
(ii) AT&T 800;
(iii) Megacom 800;
(iv) Other 800; and
(v) 800 Directory Assistance.

* * * * *

(c) * * *

(3) American Telephone and Telegraph Company Tariff F.C.C. No. 12 services;
(4) Custom tariff services;
(5) Services subject to below-the-line accounting;
(6) International services, except IMTS;
(7) Promotional offerings;
(8) Such other services as the Commission may specify.

* * * * *

3. Section 61.49 is amended by revising paragraph (d) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

* * * * *

(d) Each price cap filing that proposes service category rates below applicable band limits established in § 61.47(e) of this part, must be accompanied by supporting materials establishing that the rates cover the service category's average variable cost, or equivalently, that the service category's net additional revenue resulting from the price change exceeds additional costs.

* * * * *

4. Section 61.58 is amended by revising paragraphs (c)(2) and (c)(3) to read as follows:

§ 61.58 Notice requirements.

* * * * *

(c) * * *

(2) Tariff filings that do not cause any API to exceed any applicable PCI pursuant to calculations provided for in § 61.46 of this part, and that do not cause any SBI to exceed its banding limitations established in § 61.47 of this part, must be made on at least 14 days' notice, provided that the tariff filing is restricted to one or more of the following changes to the tariff:

(i) alters only a rate level;
(ii) adds a geographic location;
(iii) eliminates a rate element; or
(iv) changes the number or size of taper points in a volume discount plan without changing the initial volume quantity associated with the lowest discount level or the highest volume quantity associated with the highest discount level.

(3) Tariff filings that will cause any API to exceed its applicable PCI pursuant to calculations provided for in § 61.46 of this part, that will cause any SBI to exceed its upper banding limitations established in § 61.47(e) and (f) of this part, or that will cause the composite average residential rate to exceed its limitation on upward pricing flexibility established in §61.47(g) of this part, must be made on at least 120 days' notice, or such other maximum period of notice permitted by Section 203(b) of the Communications Act, regardless of whether petitions under §1.773 of the Commission's Rules have been filed.

* * * * *

FOOTNOTES

[1] In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order*) ; In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 3379 (1989) (*Erratum*). The *AT&T Price Cap Order* also included a revised proposal for implementing price cap regulation for local exchange carriers (LECs). The LEC price cap proposal was subsequently revised in a Supplemental Notice of Proposed Rule Making, 5 FCC Rcd 2176 (1990), before the Commission adopted a final set of rules for LEC price cap regulation. In the Matter of Policy and Rules Concerning Rates for Dominant Carriers (Second Report and Order), 5 FCC Rcd 6786 (1990).

[2] Parties filing reconsideration petitions, oppositions, and replies are listed in Appendix A. We use the abbreviations listed in that appendix throughout this Order.

[3] Provision of Access for 800 Service, CC Docket No. 86-10, Report and Order, 4 FCC Rcd 2824 (1989).

[4] *AT&T Price Cap Order*, 4 FCC Rcd at 3235 (para. 751). Not all services are subject to price cap regulation.

[5] *See* 47 C.F.R. § 61.47 (g). This rule limits aggregate rate increases for residential services to 1 percent per year adjusted for the price cap index. Since the Commission imposes a 3 percent productivity offset to calculate the price cap index, the net result is that residential rates must fall 2 percent in inflation-adjusted terms.

[6] *AT&T Price Cap Order*, 4 FCC Rcd at 3236 (para. 753).

[7] *Id.* at 3238 (para. 756).

[8] *Id.* at 3095-3115 (paras. 445-501).

[9] *Id.* at 3122 (para. 518).

[10] *Id.* at 3033-37 (paras. 327-36).

[11] *Id.* at 3084-89 (paras. 424-30). *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rule Making, 3 FCC Rcd 3195, 3331-40 (1988)(*Further Notice)* (paras. 250-63).

[12] *Id.* at 2878 (para. 6).

[13] Certain service categories in the Residential and Small Business basket are more strictly limited in upward pricing flexibility. *See* 47 C.F.R. § 61.47(f) and (g).

[14] *AT & T Price Cap Order*, 4 FCC Rcd at 3114 (para. 499).

[15] 47 C.F.R. § 61.58(c)(4) and 61.49(d).

[16] *Further Notice*, 3 FCC Rcd at 3357-60 (paras. 289-91); *AT & T Price Cap Order*, 4 FCC Rcd at 3066 (para. 388).

[17] *E.g.*, AT&T Petition at 12-18; API Petition at 3-9 (citing facilities-based competition and absence of showing that predatory pricing likely, and arguing that lower bands create a price umbrella, forcing AT&T to use Tariff 15 as primary competitive vehicle).

[18] *See, e.g.*, AT&T Petition at 12-18 (distinguishing the "classic" predation scenario in which a dominant firm drives competitors from the market and subsequently reaps monopoly profits).

[19] API Petition at 3-7; Ad Hoc Opposition at 4-6.

[20] API Reply at 3-6.

[21] *See, e.g.*, Ameritech Opposition at 3-4 (floors unnecessary in light ofantitrust laws, "fragility" of theory on which predation concerns are based, and other aspects of the price cap plan).

[22] *E.g.*, MCI Opposition at 15-19.

[23] *E.g.*, NTN Opposition at 6-10; NTN Reply at 5-6 (without stronger measures, AT&T has both the ability and incentive to engage in predation); Cable & Wireless Petition at 7-11 (bands should be tightened and prescribed).

[24] *AT&T Price Cap Order*, 4 FCC Rcd at 3114 (para. 499) and 3065 (para. 387).

[25] *Id.* at 3065 (para. 387).

[26] Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627 (1990) (*Interexchange Notice)*.

[27] *Id.* at 2640 (para. 116) (proposing maximum streamlined regulation of services within the Business Services basket).

[28] We therefore also reject suggestions that we replace lower bands and associated tariff review requirements with alternative devices to guard against predation. *See, e.g.*, Ad Hoc Opposition at 4-6; API Petition at 11-12.

[29] AT&T's Performance Under Price Cap Regulation, Report to Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, U.S. House of Representatives, FCC, Common Carrier Bureau, October, 1990, at 3.

[30] *Further Notice*, 3 FCC Rcd at 3357 (para. 287).

[31] We also reject arguments that would have us prescribe lower bands. Caps and bands are intended to function as a tentative "no-suspension zone," within which rate levels may change on a streamlined basis. Prescription is not required to establish a dividing line for that purpose. *See AT&T Price Cap Order*, 4 FCC Rcd at 3306 (para. 895); AT&T Communications Tariff F.C.C. No. 9 International 800 Service, Transmittal No. 1748, 4 FCC Rcd 8466 (Com.Car.Bur. 1989) (rejecting a below-band filing for failure to submit required supporting data).

[32] Comptel Petition at 10-18.

[33] Comptel Petition at 10-18; Comptel Reply at 4-10 (no consensus that average variable cost is correct standard); MCI Reply at 5-6 (standard should be long run incremental cost); Allnet Opposition at 4-5 (long run incremental cost approach is better); US Sprint Petition at 15-18 (long run marginal costs are better measure); NTN Petition at 8; NTN Reply at 6-7 ("floors" should be linked across services to protect customers of less competitive services)

[34] MCI Petition at 12-13 (commenters did not support average variable cost test); Comptel Petition at 10-18 (record on use of this test is "fragmentary," asymmetrical requirements for above and below band rates not adequately explained in record). *See also* NTN Petition at 6.

[35] MCI Petition at 6; US Sprint Petition at 13-14; Comptel Petition at 10-18 (competitors not adequately protected by after-the-fact complaints); MCI Petition at 14-16; MCI Reply at 6-8 (to calculate average variable costs, need an investigation of AT&T's network capacity and utilization); Comptel Petition at 10-18 (until better test found, AT&T should be required to show average variable cost as well as rates for each current service). *But see* Pactel Opposition at 13-14 (average variable cost test not vague or unenforceable); AT&T Opposition at 14-17 (average variable cost is the correct standard).

[36] *Compare* AT&T Petition at 12 n. *** *with* Comptel Petition at 10-18.

[37] *AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 500).

[38] One treatise on industrial organization cites no less than seven analytical methods economists might use to identify predatory activities. J. Ordover & G. Saloner, "Predation, Monopolization, and Antitrust," *in Handbook of Industrial Organization* (Vol. 1), Schmalensee & Willig (eds.) (1989) at 579-590.

[39] Long run incremental costs or other adjustments proposed by parties to the tariff showing do not share the widespread usage of average variable cost. *See, e.g., Southern Pacific Communications Co. v. AT&T*, 740 F. 2d 980, 1002-07 (D.C.Cir. 1984)(finding prices below average variable cost presumptively illegal); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786 (2d Cir. 1987)(taking the same approach as the D.C. Circuit); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)(prices above incremental and average total costs not predatory); *SuperTurf, Inc. v. Monsano Co.*, 660 F.2d 1275 (8th Cir. 1981)(price below fully allocated costs but above average variable cost is not predatory absent predatory intent or other conduct); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir. 1977)(prices above average variable cost, but less than average total cost not predatory).

[40] *AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 500).

[41] *See AT&T Price Cap Order*, 4 FCC Rcd at 3115 (para. 501) (describing as variable costs access costs, billing and collection costs, and any other non-fixed costs which would not be incurred if the service were not be offered).

[42] *See* AT&T Communications Tariff F.C.C. N. 9, Transmittal 1748, 4 FCC Rcd 8466 (Com.Car.Bur. 1989) (rejecting an AT&T tariff for failure to make the correct incremental net revenue showing). The Order rejecting Transmittal 1748 explains that average variable cost is composed of variable costs divided by the quantity of output for which the costs are incurred. One way to make an average variable cost showing is to compute the services' total variable costs for the relevant period and show that these costs were less than total revenues for the service. Total revenue that is greater than total cost means that average revenue (price) exceeds average variable cost, since both are computed using the same demand base. *Id.* at 8467 (para. 11). We also note that the incremental net revenue showing AT&T

made in Transmittal 1690 included some fixed costs. Such a showing gives us even more confidence that the rates cover average variable cost.

[43] Appendix B to this Order contains amendments to the Code of Federal Regulations.

[44] Allnet Petition at 5-6; Comptel Petition at 6-10; Comptel Opposition at 2, 5-6 (Commission use of "ill-defined" average variable cost test requires greater reliance on "no-credit" rule); MCI Petition at 17-18; MCI Opposition at 14-15 (denial of credit for below-band price changes would minimize anti- competitive conduct by AT&T); NTN Petition at 7; NTN Reply at 7 ("no-credit" rule would mitigate AT&T's ability to price predatorily). *But see* AT&T Opposition at 13-14; BellSouth Opposition at 2-3 (arguing that parties advocating the "no-credit" rule are all competitors of AT&T).

[45] *See AT&T Price Cap Order*, 4 FCC Rcd at 3066 (para. 388).

[46] IDCMA Petition at 1-9; Comptel Opposition at 4-5; MCI Petition at 16-17; TCA Petition at 12-16; MCI Reply at 2-3.

[47] IDCMA Petition at 1-9.

[48] Cable & Wireless Petition at 11-12; US Sprint Petition at 3-9; TLD Petition at 3-6; TLD Reply at 2-3.

[49] TLD Petition at 3-6; TLD Reply at 2-3; MCI Petition at 16-17; MCI Opposition at 15; MCI Reply at 4.

[50] US Sprint Petition at 3-9; US Sprint Reply at 2-5.

[51] *AT&T Price Cap Order*, 4 FCC Rcd at 3051 (para. 359).

[52] *Id.* at 3065 (para. 386).

[53] *Interexchange Notice*, 5 FCC Rcd 2627 (1990).

[54] AT&T Opposition at 4-9.

[55] We also disagree with TCA's argument that the Commission failed to provide adequate notice under the Administrative Procedure Act of its decision to include switched and private line services in the same basket. The Commission proposed in the *Further Notice* to employ two baskets, one for switched and one for private line service. We believe our decision, in response to extensive comments, to employ three baskets instead of two, was well within the scope of the *Further Notice*. We note that TCA itself filed comments opposing the two-basket approach set forth in the *Further Notice*.

[56] MCI Petition at 18-19; Comptel Petition at 3-6. *But see* AT&T Opposition at 11-12 (arguing that the system of baskets and bands will allow it to realize greater efficiencies, and that additional categories are not needed).

[57] IDCMA Petition at 12-18. IDCMA argues that private line services within the Business basket should be divided into the following categories: (1) voice grade and below; (2) subrate DDS (2.4, 4.8, 9.6 kbps); (3) 56 kbps DDS; (4) hi-cap; and (5) other private line services.

[58] Comptel Petition at 3-6; Comptel Opposition at 2. *See also* TLD Petition at 6-10; MCI Petition at 18-19; IDCMA Petition at 12-18.

[59] *AT&T Price Cap Order*, 4 FCC Rcd at 2922 (para. 100).

[60] However, in Section II., C., 4, of this Order, *infra*, we create a fifth category for 800 directory assistance, a new service that will be incorporated into the 800 service basket on July 1, 1991.

[61] *AT&T Price Cap Order*, 4 FCC Rcd at 3064-65 (paras. 385-86).

[62] The Residential and Small Business basket has approximately $16 billion in annual revenues, and six service categories. The 800 Services basket has $3.4 billion in revenues and four categories. The Business basket has approximately $6 billion in revenues and seven service categories. AT&T Tr. No. 2304, D&J at Exhibit 5, filed May 17, 1990.

[63] *AT&T Price Cap Order*, 4 FCC Rcd at 3060 (para. 377).

[64] Allnet Petition at 2-4; Allnet Reply at 1-2. *See also* Comptel Opposition at 15 (endorsing Allnet's proposal).

[65] The Commission, of course, recognized that in reality it is impossible for every rate to be set at marginal cost in the long run, since rates need to recover some fixed costs in order to be economic. *AT&T Price Cap Order*, 4 FCC Rcd at 2924 (para. 105).

[66] MCI Petition at 19-22 (arguing that promotional pricing activities should be reflected in price indexes and treated as restructured offerings); US Sprint Opposition at 6 (lack of clarity with regard to promotional activities provides additional opportunities for anticompetitive activity).

[67] *See, e.g., Second Report and Order* at para. 65-70 (discussing the importance of increased usage for LECs in meeting a productivity standard).

[68] *AT&T Price Cap Order*, 4 FCC Rcd at 2912 (para. 84) and 2924-25 (paras. 104-06).

[69] *Id.* at 3051-53 (paras. 359-62).

[70] In the last two years, AT&T has been filing a significant number of promotional tariff transmittals. In the last six months in the Residential and Small Business Basket alone, AT&T has filed various transmittals to make promotional offerings worth nearly $40 million. Company-wide, the transmittals AT&T has filed during the last calendar year, together with previously allowed promotional tariffs, allow AT&T to offer more than $100 million in promotions. In some cases, AT&T elects not to change rates the full amount the tariff specifies, so the levels contained in the transmittals are not equivalent to actual rate changes. Nevertheless, the amounts involved in promotional activity are significant.

[71] Appendix B, *infra*, amends the price cap rules to exclude these promotional price changes from index calculations. We also make minor amendments to our rules to specifically list all services excluded from price cap regulation, as listed in the *AT&T Price Cap Order* and in this Memorandum Opinion and Order.

[72] If, for example, AT&T's prices are at the cap in a basket, AT&T may increase one of those rates only by filing a transmittal that provides detailed cost support required of an above-cap filing, or by offsetting the increase with a decrease in a different rate elsewhere in the basket.

[73] By this decision we do not alter the tariff support required for tariffs filed pursuant to the "generic" promotions order issued by the Bureau in 1989. In the "generic" transmittal, AT&T filed descriptions of a variety of promotions that it represented may be implemented in the future, and the cost support to justify spending a total of $50 million on those promotions. Actual implementation of the promotions would be handled by a filing routinely made on 5 days' notice. AT&T has not yet fully utilized the $50 million authorization, and from time to time continues to file tariffs pursuant to the "generic" tariff. *AT & T Communications*, Transmittal Nos. 1431 & 1552, 4 FCC Rcd 4475 (Com.Car.Bur. 1989).

[74] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied* 109 S.Ct. 1942 (parties must show detrimental reliance on an existing policy in order to avoid application of that policy to them). *See also* note 176, *infra*.

[75] Provision of Access for 800 Service, 4 FCC Rcd 2824, 2836 (1989)(*800 Data Base Order*).

[76] The time lapse between the introduction of a "new" offering and its introduction into price caps permits demand information to be developed, from which the actual price indexes and service band indexes are calculated. *AT & T Price Cap Order*, 4 FCC Rcd at 3123 (para. 520).

[77] Quantities associated with operator and credit card calls that stem from Business basket services are attributed to the Business basket for the purposes of calculating the Actual Price Index and Service Band Indexes in that basket. These operator and credit card quantities are therefore not reflected in the Residential basket. AT&T Communications, Revisions To Tariff Nos. 1 and 13, Transmittal No. 1618, 4 FCC Rcd 5783, 5788 (para. 53).

[78] *See* Appendix B.

[79] *See 800 Data Base Order*, 4 FCC Rcd at 2836 (para. 104).

[80] No party has sought reconsideration of our decision in the *800 Data Base Order* not to take provision of 800 DA away from AT&T.

[81] *AT & T Price Cap Order*, 4 FCC Rcd at 3028-3029, 3055 (paras. 318-319, 366). Since Traffic Sensitive (TS) access is charged on a per minute basis, and the flow-through rule allocates access charge changes on a per minute basis, AT&T allocates changes in its TS access costs in a manner that exactly mirrors changes in its access payments to LECs. Similarly, allocation of special access charge changes is not at issue.

[82] AT&T Petition at 1-12.

[83] AT&T further argues that the flow-through rule was not properly noticed under the Administrative Procedure Act (APA), since the Commission included a different flow-through rule in its May 1988 Further Notice of Proposed Rule Making. We believe the change in the flow-through rule was well within the scope of the *Further Notice*. *See Further Notice*, 3 FCC Rcd 3195, 3353 (seeking comment on a two-basket approach to dividing AT&T's services, and noting that such an approach would simplify access flow throughs). The access flow through rule adopted in the Report and Order became necessary as a logical outgrowth of the decision to expand the number of baskets to three.

[84] *E.g.*, PRTC Petition at 3-6.

[85] MTS and WATS Market Structure, 2 FCC Rcd 2953 (1987), *recon.* 3 FCC Rcd 4543 (1988), *aff'd, District of Columbia PSC v. FCC*, 897 F.2d 1168 (D.C.Cir. 1990); Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, 4 FCC Rcd 6134 (1989)(resolving how the per presubscribed line charge would be assessed), *appeal docketed, ALC Communications v. FCC*, No. 90-1041 (D.C.Cir. 1990).

[86] Cable & Wireless Petition at 15; MCI Petition at 7-8; TLD Petition at 10-12; PRTC Petition at 3-6; Comptel Opposition at 17-19.

[87] *See, e.g.*, Cable & Wireless Petition at 15; TLD Petition at 10-12; PRTC Petition at 3-6.

[88] *AT & T Price Cap Order*, 4 FCC Rcd at 3005 (para. 259), 3021-26 (para. 304).

[89] *E.g.*, Bell Atlantic Comments at 1-5. *See also AT & T Price Cap Order*, 4 FCC Rcd at 3025-26 (para. 314).

[90] The LECs argue this result would occur as long as LEC access is less than or equal to the cost of bypass.

[91] *AT & T Price Cap Order*, 4 FCC Rcd at 3029 (para. 321).

[92] In order to make uneconomic bypass profitable, AT&T would need to be able to predict accurately the future time path of non-LEC access costs, and the future time path of inflation since inflation has a bearing on the costs of current losses that would later need to be recouped through the added pricing flexibility afforded by a higher PCI. In addition, market conditions would need to be such that AT&T could actually increase revenues by raising its prices to meet the elevated PCI. *See AT & T Price Cap Order*, 4 FCC Rcd at 3029 (para. 321).

[93] We do not address Bell Atlantic's specific suggestions about the manner in which we sould handle bypass as an exogenous cost, given our determination that the cost of bypass is not exogenous. *See* Bell Atlantic Petition at 7-9.

[94] *AT & T Price Cap Order*, 4 FCC Rcd at 2922-23 (paras. 100-02).

[95] *See id.*, 4 FCC Rcd at 3017-18 (paras. 294-95).

[96] DC PSC Petition at 6-7.

[97] *See AT & T Price Cap Order*, 4 FCC Rcd at 3009-10 (paras. 272-76).

[98] As the Commission explained in the *AT & T Price Cap Order*, GAAP changes are promulgated by the Financial Accounting Standards Board (FASB). While some of the changes FASB makes to GAAP affect only certain industries, other changes have near-universal impact on U.S. corporate accounting practices. Once FASB has implemented a change in GAAP, carriers subject to our Part 32 accounting rules are required to notify us of their intention to apply the GAAP change. They may make the change only if we find it compatible with our regulatory accounting needs. Furthermore, some GAAP Changes require amendment to our accounting rules. *Id.* at 3017 (para. 295).

[99] *Id.* at 3017 n.605.

[100] *Id.* at 3122-29 (paras. 518-34).

[101] AT&T Petition at 18-23.

[102] *See Interexchange Notice*, 5 FCC Rcd 2627 (1990).

[103] *See* 47 C.F.R. § 61.58(c)(2) for the "reprice" rule.

[104] *AT&T Price Cap Order*, 4 FCC Rcd at 3072-74 (paras. 401-05), 3078-79(paras. 415-17).

[105] We encourage AT&T, in the interest of clarity, to maintain its current practice of making a statement in its transmittal letter that indexes are unchanged since no prices or base year quantities change.

[106] *See* AT&T Communications, Revisions to Tariff F.C.C. Nos. 1, 2, and 14, Transmittal 1731, 4 FCC Rcd 6645 (Com.Car.Bur. 1989).

[107] We stress that inclusion of this type of filing in the group of filings we treat as streamlined provides only a *presumption* of lawfulness, and that this presumption can be overcome. Evidence that elimination of a rate element raises discrimination issues, or other concerns under the Communications Act, would cause us to suspend the filing, or at a minimum, defer it for further examination. We expect, however, that these cases will be few.

[108] Expansion of the taper on either end, however, requires AT&T to estimate "take rates" for the expanded discount program. We believe that once "take rates" become necessary to the recalculation of demand, the filing should be treated as a restructure.

[109] Cable & Wireless Petition at 16.

[110] Cable & Wireless Petition at 16-17.

[111] *AT&T Price Cap Order*, 4 FCC Rcd at 3126 (para. 526).

[112] TLD Petition at 12-15; TLD Reply at 8-9.

[113] *AT&T Price Cap Order*, 4 FCC at 3126-27 (para. 527-28).

[114] US Sprint Petition at 16.

[115] *AT&T Price Cap Order*, 4 FCC Rcd at 3097-3100 (paras. 453-58).

[116] 47 C.F.R. § 61.49(b).

[117] 47 C.F.R. §§ 61.46 and 61.47.

[118] Allnet Opposition at 5-7; IDCMA Petition at 21.

[119] IDCMA Opposition at 19-25.

[120] *AT&T Price Cap Order*, 4 FCC Rcd at 3098 (para. 456).

[121] *Id.* at 3099 (para. 458).

[122] This process is undertaken by our staff at AT&T's offices at the time of the annual price cap filing when AT&T updates its base year quantity data. That annual review becomes a basis for judging subsequent filings for the following year.

[123] *See* AT&T Communications, Transmittal No. 1618, 4 FCC Rcd 5783, 5786 (Com.Car.Bur. 1989)(para. 30) (rejecting similar appeals made in response to AT&T's first price cap filing), app. for review *pending*. We also reject Allnet's proposal to permit disclosure of historical demand data at the rate element level if the intervening party signs a proprietary agreement with AT&T. Allnet Reply at 5-6. Allnet has not demonstrated how its counsel's participation in the process of "checking the math" will contribute to an evaluation of the indexes. Nor does Allnet allege that the business records used to identify historical demand would be inaccurate, and that its participation would enable us to correct any inaccuracies.

[124] Ad Hoc Petition at 23-24; IDCMA Petition at 8, n.5.

[125] *AT &T Price Cap Order*, 4 FCC Rcd at 3103 (paras. 466-68).

[126] *Id.* at 3103-05 (paras. 469-473).

[127] *Id.* at 3103-07 (paras. 466-478).

[128] *See id.* at 3101 (para. 462) and 3106 (para. 478).

[129] *Id.* at 3105-06 (paras. 474-77). *See* Pactel Opposition at 15-18.

[130] Federal Communications Commission Authorization Act of 1990, Public Law 101-396, Section 7. *See* Amendment of Section 58(a)(2) of the Commission's Rules and Regulations, FCC 90-428, released January 7, 1991 (amending the tariff rules to allow the Chief, Common Carrier Bureau to defer tariffs to the full extent authorized under statute).

[131] *AT&T Price Cap Order*, 4 FCC Rcd at 3103 (paras. 467-68).

[132] *Id.* at 3103 (para. 468).

[133] For the same reasons, we will extend the notice period associated with above-cap filings to 120 days.

[134] Ad Hoc Petition at 17-21; IDCMA Petition at 24.

[135] *AT&T Price Cap Order*, 4 FCC Rcd at 3109-11 (paras. 486-91).

[136] *Id.* at 3109 (paras. 487).

[137] Ad Hoc Petition at 7-9.

[138] *Id.* at 9-11.

[139] *See* Pactel Opposition at 18-20.

[140] *AT&T Price Cap Order*, 4 FCC Rcd at 2976 (para. 200).

[141] Ad Hoc Petition at 15-22.

[142] *AT&T Price Cap Order*, 4 FCC Rcd at 2990 (para. 222).

[143] *Further Notice*, 3 FCC Rcd at 3402 (para. 371).

[144] Total factor productivity studies compare a company's total inputs (i.e., capital, labor) to its outputs. Total factor productivity studies are therefore characterized as "direct" measures of a company's productivity.

[145] Ad Hoc argues that the Commission erred in the calculation of AT&T's post-divestiture productivity, as presented in Appendix C of the *AT&T Price Cap Order*. According to Ad Hoc, the Appendix does not properly reflect demand growth occuring in the post-divestiture period. If properly included in the calculation, Ad Hoc states, AT&T's productivity would be 4.08 percent. Ad Hoc Petition at 22-23. We reject Ad Hoc's argument. First, demand growth occuring in the post-divestiture period is reflected in both the revenue and cost portions of the Appendix C analysis, since growing demand will affect revenues and costs. Second, while Ad Hoc's calculation may result in a productivity measure of AT&T's post-divestiture performance, it does not appear to represent a measure of the relevant productivity differential -- the amount by which AT&T's productivity exceeded that of the economy generally.

[146] *LEC Price Cap Order* at paras. 55-102.

[147] *AT&T Price Cap Order*, 4 FCC Rcd 3084-86 (paras. 424-25).

[148] *Id.* at 3086-88 (paras. 426-28).

[149] Ad Hoc Petition at 3-4, 6.

[150] Maryland PC/NASUCA Petition at 2.

[151] *AT&T Price Cap Order*, 4 FCC Rcd at 3295-3307 (paras. 881-895).

[152] US Sprint Petition at 19-21; US Sprint Reply at 9-10.

[153] *AT&T Price Cap Order*, 4 FCC Rcd at 3033 (para. 328)

[154] *Id.* at 3035 (para. 331) and 47 C.F.R. § 61.44(c).

[155] *See* Section 61.49(g) of the Commission's Rules, 47 C.F.R. §61.49(g) (providing cost support for new services). *See also AT&T Price Cap Order*, 4 FCC Rcd at 3033 (para. 327)(excluded services are subject to conventional tariff review).

[156] NTN Petition at 3-5; NTN Reply at 4-5.

[157] *See* Ad Hoc Petition at 13-15; Maryland/NASUCA Petition at 3-4.

[158] *AT&T Price Cap Order*, 4 FCC Rcd at 3143 (para. 561).

[159] Cable & Wireless argues that since AT&T will be evaluated based on earnings levels, opportunities and incentives for inefficient pricing have not been eliminated. As the Commission stated in the *AT&T Price Cap Order*, this is partially true. 4 FCC Rcd at 3141 (para. 558). In fact, the selection of a relatively lengthy four-year review cycle was structured in response to concerns about minimizing the effect of price caps earnings monitoring on AT&T's investment and expense decisions.

[160] Ad Hoc Petition at 11-13; US Sprint Reply at 9-10.

[161] Ad Hoc Petition at 13 n.8.

[162] American Telephone and Telegraph Co., Manual and Procedures for the Allocation of Costs, 84 FCC 2d 384 (1980), *recon.* 86 FCC 2d 667 (1981), *aff'd sub nom.* MCI Telecommunication v. FCC, 675 F.2d 408 (D.C.Cir. 1982), *modified* 94 FCC 2d 1118 (1983). Pursuant to a subsequent waiver issued by the Common Carrier Bureau, AT&T was permitted to combine the MTS and WATS categories, pending Commission action on a petition to amend the ICAM. American Telephone and Telegraph Co., 2 FCC Rcd 4044 (Com.Car.Bur. 1987).

[163] *AT&T Price Cap Order*, 4 FCC Rcd at 2924-25 (paras. 105-06).

[164] *Id.* at 3132-34 (paras. 537-41).

[165] NCTA Petition at 4; Hawaii Opposition at 1-4.

[166] TLD Petition at 6-10.

[167] *AT&T Price Cap Order*, 4 FCC Rcd at 3133 (para. 539).

[168] Consistent with our decision to extend the notice period for above-band and above-cap filings to 120 days, we also decide that filings proposing to geographically deaverage rates would likewise be subject to the full notice period authorized by statute.

[169] Recasting of mileage band prices is not an issue unique to price caps. *See* AT&T Communications, Tariff F.C.C. Nos. 9, 10 and 11, 3 FCC Rcd 4579, 4590 (1988)(terminating an investigation of an increase in private line short haul rates).

[170] Maryland/NASUCA Petition at 4-5; Cable & Wireless Petition at 7.

[171] *Id.* at 2961 (para. 170).

[172] *Id.* at 2927 n.183. Since adoption of the *AT&T Price Cap Order*, additional states have adopted incentive regulation of AT&T. For example, Michigan has adopted price cap regulation for AT&T for a four-year period, while Oregon now classifies AT&T as a "competitive telecommunications provider," regulating AT&T in a manner similar to its competitors.

[173] *AT&T Price Cap Order*, 4 FCC Rcd at 2951-57 (paras. 148-61).

[174] DC PSC Petition at 4-5, and n.13.

[175] *AT&T Price Cap Order*, 4 FCC Rcd at 2956 (para. 159).

[176] Good cause exists to make this rule change effective in advance of 30 days following Federal Register publication so that pending AT&T tariff transmittals involving promotions may be evaluated under the price caps rules as reflected in this Memorandum Opinion and Order. AT&T was on notice that the Commission might clarify its price cap plan with respect to treatment of promotions upon filing of petitions for reconsideration on this subject, well before the filing of the pending tariff transmittals. AT&T participated fully in this proceeding, and our decision was made after consideration of its views. Accordingly, we believe it is appropriate and fair to apply the clarification regarding promotions immediately upon publication in the Federal Register.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-9

In re Applications of

CATALINA RADIO, A CALIFORNIA LIMITED PARTNERSHIP — File No. BPH-860529MC

CRESCENT RADIO LIMITED PARTNERSHIP — File No. BPH-860530MG

For Construction Permit
for New FM Station, Channel 224A,
Avalon, California

ORDER

Adopted: January 29, 1991 **Released: February 6, 1991**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On November 16, 1990, Crescent Radio Limited Partnership filed with the Review Board an Emergency Appeal from various rulings made by the presiding Administrative Law Judge, as well as a Motion for Stay of the hearing proceedings. Thereafter, both parties entered into a joint settlement agreement which was subsequently approved by the Presiding Officer in *Memorandum Opinion and Order*, FCC 90M-4062, released December 26, 1990. This action effectively moots the Crescent Radio pleadings pending before the Board.

2. ACCORDINGLY, IT IS ORDERED, That the Emergency Appeal, filed November 16, 1990, as supplemented November 26, 1990, and the Motion for Stay, filed November 16, 1990, by Crescent Radio Limited Partnership ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Application of

Pacific Bell File No. W-P-D-354

To discontinue channel service
on its broadband cable distribution
facilities in and around the City
of Palo Alto, California, and
request for limited waiver.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 18, 1991; Released: January 22, 1991

By the Commission:

I. INTRODUCTION

1. Before the Commission is the application and petition for limited waiver of Pacific Bell (Pacific or Applicant), a subsidiary of Pacific Telesis, filed pursuant to 47 U.S.C. § 214 and 47 C.F.R. §§ 63.56, 63.62(f) and 63.505. Pacific asserts that grant of its application will allow it to (1) discontinue providing channel service to Cable Communications Cooperative of Palo Alto, Inc. (CCC) over approximately 471 route miles of broadband cable distribution facilities and associated equipment passing 50,000 locations in and around Palo Alto and serving about 18,000 homes;[1] (2) pursuant to the Purchase Agreement, sell the channel facilities to CCC, the nonexclusive cable television franchisee for the area since October 1986; (3) continue to maintain the facilities for one year from date of transfer; and (4) provide such pole line and conduit space licenses as CCC requests from Applicant for the service area. Announcement of the filing appeared in the Public Notices of May 30, 1990 of the Domestic Facilities Division, Common Carrier Bureau (Report No. D-542), and interested persons were afforded 30 days in which to file comments or petitions.

2. Comments were filed by the National Cable Television Association, Inc. (NCTA) and the California Cable Television Association (CCTA), to which Pacific, CCC, the Consumer Federation of America (CFA), and the City of Palo Alto replied. Thereafter, Pacific filed Amendments Nos. 1, 2 and 3 to the Purchase Agreement, and CCC submitted supplemental information in support of Pacific's application, to which CCTA responded. On November 20, 1990, pursuant to staff request, Pacific furnished copies of (1) the Agreement dated March 17, 1986 between Pacific and CCC for the Provision of Broadband Distribution Facilities (Lease), (2) a "Standstill Agreement" between Pacific and CCC, dated October 18, 1989, and extension thereof, and (3) Memorandum of Understanding between the parties and first and second amendments thereof. CCC also submitted greater detail about its proposed financial restructuring and the role it hoped Pacific would be permitted to take in those plans. On November 28, 1990, NCTA furnished for consideration by the Commission proposed language for resolving certain of the controversies in this proceeding, and on December 5, CCTA submitted additional proposed language in clarification of its position, to which Pacific responded.

3. For the reasons explained herein, we grant the application and waiver petition subject to conditions.

II. BACKGROUND

4. On March 9, 1984, Pacific applied for authority to construct and operate a broadband distribution system in Palo Alto and nearby communities, intending to lease channels for the provision of cable television service (File No. W-P-C-5384). The application was opposed by CCC and by Century Federal, Inc. (Century) a local cable television system. On October 19, 1984, Pacific asked that the Commission defer action until a decision was reached between itself and a cable franchisee. On October 29, 1984, the Chief, Domestic Facilities Division, dismissed the application, without prejudice, as incomplete because the applicant did not demonstrate that there was a subscriber for the proposed facilities.

5. Thereafter, Pacific applied for, and was granted, authority to construct and maintain broadband cable distribution facilities in and around Palo Alto for the exclusive use of CCC. *Pacific Bell*, Memorandum Opinion and Order (MO&O) in File W-P-C-5753 adopted July 14, 1986, 60 Rad. Reg. 2d (P&F) 1175 (Comm. Car. Bur., 1986). As economic justification for its proposal, Pacific estimated its costs of constructing the system would be $11.7 million, with annual revenues approximating $2.8 million. The grant was subject, *inter alia*, to affirmation by CCC that: it had secured a loan agreement with the National Consumer Cooperative Bank which provided for contingent financing to supplement CCC's projected operating income; that CCC would be bound by its obligation to pay Pacific's rates as set forth in its tariff; and that grant of Pacific's application would create nothing more than a normal carrier-customer relationship, and not a debtor-creditor arrangement. On reconsideration, the Commission affirmed the Bureau's order, but required Pacific to amend its tariff "to eliminate the provisions regarding rescheduling of use payments and deferred payments of electrical costs." *See Pacific Bell* (recons.), 2 FCC Rcd 265, 267 (1987), *aff'd Century Federal, Inc. v. F.C.C.*, 846 F.2d 1479 (D.C. Cir. 1988) (*Pacific Bell*).[2]

III. APPLICATION

6. Pacific filed the subject application to discontinue channel service and to request limited waiver of the Commission's affiliation standards (47 C.F.R. § 63.54, n.1) to permit it to enter into a Purchase Agreement with CCC for sale of the channel facilities to CCC for $18.7 million and to continue to maintain the facilities for CCC for one year. The purchase offer, explains Pacific, was initiated by CCC

> in the belief that ownership of the Facilities would enhance CCC's ability to obtain financing. Without such financing, CCC was uncertain that it would be able to continue to provide, must less improve, the level of cable television services. In addition to owning the Facilities, CCC wished to use new fi-

> nancing to maintain and improve its existing cable service and cannot afford to exhaust that financing in payment for the Facilities.

Application at 12-13.

Pacific asserts that its sale of the facilities will not adversely affect the present or future public convenience or necessity because all facilities currently provided under long-term lease to CCC are not used by Pacific to provide services to any other customer, and because as a result of the transfer of facilities, CCC will continue to provide existing services to the service area pursuant to its current franchise obligation. *Id.* at 8. Moreover, Pacific states,

> [i]n the unique circumstances of this transaction where, unlike other affiliation related waiver requests, Applicant seeks to cease providing channel service, application of the Note 1 affiliation standard would eliminate a solution required by CCC's business needs and its desire to continue to provide cable television service to its customers.

Id. at 12.

7. Subsequent to the filing of its application, Pacific revealed that on October 18, 1989, CCC and Pacific had entered into the Standstill Agreement which provides that Pacific will not take action against CCC with respect to nonpayment of certain payments due under the Lease. The Standstill Agreement discloses that CCC, "due to operational and financial constraints," failed to make monthly payments under the Lease for the months of May through September 1989 in the amount of $515,015.61. It was agreed that CCC would pay Pacific $53,126.50 (which the parties calculated as being 50% of the use and maintenance payments otherwise due in the month of October) on or before October 31, 1989, and thereafter to resume making monthly use and maintenance payments in full by the end of the month in which they come due in accordance with the terms of the Lease.

IV. PURCHASE AGREEMENT

8. The parties entered into the Purchase Agreement effective as of April 20, 1990, portions of which were replaced or amended by Amendment No. 1, entered into as of July 31, 1990, Amendment No. 2, effective September 28, 1990, and Amendment No. 3, effective November 30, 1990. Pacific is required also to complete construction of certain cable plant at an estimated cost of $463,500, an expense reflected in the purchase price. Purchase Agreement, para. 8.8 as amended by Amendment No. 2, and Exhibit B at p.2. The purchase price is (a) $18.67 million; (b) approximately $1.44 million "constituting all amounts due and owing to Pacific under the Lease Agreement as of August 1, 1990, including but not limited to past due payments, construction charges, and late charges . . . [including] additional late charges from August 1, 1990, to Closing . . . ; and (c) the total of the regular monthly payments under the Lease accruing after August 1, 1990, prorated to the date of Closing (the "Additional Lease Amount") . . . ." At closing, CCC will pay to Pacific (a) $4.47 million as part of the purchase price and settlement amount and (b) the additional lease amount, and deliver to Pacific its promissory note in the principal amount equal to the balance of the purchase price and settlement amount. The cash payment will be allocated first to the additional lease amount, second to the settlement amount and third to maintenance inventory, easements, permits and plant in that order. Purchase Agreement, para. 3.1, as replaced by Amendment No. 1, para. 3.1.

9. The total of CCC's promissory note to Pacific calculated as of an August 1, 1989 closing date is $15,636,360.36. Purchase Agreement, Exhibit C. No interest will be due and payable on the note until 7-1/2 years after closing. Commencing with the first interest date, CCC will pay current interest only on the outstanding balance of the note, due and payable monthly in arrears. The entire principal balance and all unpaid and accrued interest on the note (including all interest accrued prior to the interest payment date) will be due and payable on the eighth anniversary of closing. The Purchase Agreement also provides that CCC obtain from one or more banks, insurance companies or other financial institutions commitments to fund at least $19,000,000 in the aggregate, at Closing. Purchase Agreement, para. 6.5 as replaced by Amendment No. 1. CCC shall advise Pacific monthly on the status of its efforts to obtain senior debt financing. Purchase Agreement, para. 5.

10. Paragraph 5, Amendment No. 3 of the Purchase Agreement establishes a closing date of January 14, 1991.

V. WAIVER

11. Pacific concedes that the financial and business relationship proposed between itself and CCC, specifically its loan agreement and maintenance agreement, would violate the affiliation proscription of 47 C.F.R. § 63.54, n.1. [3] However, Pacific argues, a waiver is justified because the proposed relationship will provide substantial benefit to the public without undermining the purpose of the cross-ownership rule or the affiliation standard of 47 U.S.C. § 533(b), and pleads that a waiver is appropriate based on the public interest and need showings endorsed by the Commission in both its *Clarification and Notice of Proposed Rule Making*, 69 F.C.C. 2d 1097 (1978) at para. 22, and *Sugar Land Telephone Company*, 76 F.C.C. 2d 230 (1980) at para. 7. Application at 11-12. Pacific reasons that the Cable Act requires ownership and/or control of the cable entity by the carrier for a prohibited affiliation to occur (citing 47 U.S.C. §§ 533(b), 602(1), and 613(b)), whereas note 1 to 47 C.F.R. § 63.54 exceeds that definition by deeming affiliation to occur whenever cable and telephone companies interact as other than a carrier or user. Pacific asserts that

> [t]he Commission has recognized that Note 1 unnecessarily limits the permissible interaction between cable and telephone companies and has tentatively concluded that adoption of an affiliation standard for cable/telephone cross ownership similar to those standards for cable/broadcast cross ownership (which are based on ownership or control) would serve the public interest.

Application at 14-15 and n.12, citing *Further Notice of Inquiry and Notice of Proposed Rule Making* in CC Docket 87-266, 3 FCC Rcd 5849, 5866 (1988). Pacific says that it will continue to maintain books of account for the costs, expenses and revenues from the sale and maintenance of the facilities separate from books of account for its telephone facilities. *Id.* at 17.

VI. PLEADINGS

12. In its pleading of June 29, 1990, CCTA states that while it does not wish to deprive the citizens of Palo Alto of service or to delay unnecessarily transfer of the facilities, it does urge the Commission to review the separate books of account it required Pacific to maintain so as to determine whether cross-subsidy has occurred (*see Pacific Bell* at para. 13); to publicly disclose the results; and to allow full opportunity for public comment. Moreover, CCTA questions whether Pacific's continuation of service after CCC defaulted in payments violated the cross-ownership rules, and recommends the Commission determine how long the amounts aggregating approximately $1.44 million have been outstanding and the circumstances under which Pacific continues to provide service. CCTA also questions the impact of the security interest Pacific proposes to retain if the purchaser defaults, and recommends the Commission question Pacific further on how that interest would operate and, when documented, have it filed for public review. CCTA claims to have been told by various sources that Pacific's estimated construction cost of the system substantially exceeded its estimate of $11.7 million, and notes that the tariff rate was never revised to reflect any change in underlying cost. CCTA argues that permitting a video supplier on a "video dial tone" system to defer transport payments would create an unfair cost advantage and set a very dangerous precedent. Finally, CCTA states that its proposal for an audit is independent of the decision to grant authority for Pacific's discontinuance of service and transfer of the facilities to CCC, and suggests that any revenue reallocation or other sanctions on Pacific would be independent of the transaction contemplated by Pacific's application. CCTA states that it does not wish the audit to hinder the Commission's consideration and approval of Pacific's request, since CCTA wishes to do nothing which would hinder Pacific exiting the cable business in Palo Alto and elsewhere.

13. In its pleading of July 12, 1990, CCC supports Pacific's application for waiver to permit Pacific "(a) to provide financing for |CCC's| purchase of |Pacific's| channel distribution service facilities . . . and (b) to maintain the Cable Plant for a one-year period following the purchase." CCC emphasizes that there would be no reasonable possibility for it to finance the purchase unless the waiver sought is granted. CCC relates that it has entered into loan commitment agreements (and is in the process of negotiating loan agreements) with two senior lenders for an aggregate commitment of $21 million, $2 million of which is to be set aside as reserved, unavailable funds. CCC claims that these loans will be used to make partial payment for purchase of the cable plant, repay existing debt obligations, acquire converters, repay miscellaneous fees, and for other general corporate purposes. The total uses of funds are expected to be approximately $37 million. "Based upon numerous prior applications to other banks, credit institutions, and insurance companies, |CCC| would not be able to secure the additional funds from other lenders. Therefore, a condition of the senior debt financing is the receipt of the necessary funding from |Pacific|. Unless |Pacific| is allowed to provide the requested financing, |CCC| will not be able to purchase the Cable Plant." CCC contends that its inability to borrow the balance of the necessary funds from other sources is attributable to general conditions in the credit markets and the fact that a great many lending institutions have indicated reluctance to make loans to CCC because of its consumer cooperative structure.

14. CCC judges Pacific's application as a unique opportunity presented to the Commission to benefit CCC and the member-subscribers it serves in more than 18,000 homes in the Palo Alto area, and pleads that delay in Commission approval of the application may jeopardize the transaction and senior financing arranged.

15. CFA supports Pacific's application for waiver and believes that cooperative ownership over the long term may provide substantial advantages in dealing with many of the concerns that have been raised about the cable industry in recent years. Because of the unique situation in which a limited waiver can sustain an experiment in cooperative ownership of a cable system, CFA believes that a limited waiver, with appropriate control limitations over Pacific's daily operation and programming, should be granted. If CCC cannot obtain comparable financing from other sources, grant of the limited waiver would be in the public interest, states CFA.

16. The City of Palo Alto also supports Pacific's request for waiver and relates that "|CCC| was awarded the franchise to serve Palo Alto and surrounding areas in part because it promised to ensure local control of the cable television system by a democratically elected board of directors." The city believes that CCC's purchase of the facilities will be in the public interest, and understands that ownership of the channel distribution service facilities will enhance CCC's financial condition. The city also understands that CCC does not have other realistic opportunities to finance the acquisition without the partial financing provided by Pacific, and believes that CCC's purchase of the facilities will benefit the consumers served by the system.

17. In its reply, Pacific argues that it has established good cause for granting the waiver in that more than mere general public benefit will result from the proposed relationship. "Absent approval of this limited waiver, the continued viability of the sole cable TV provider in the Palo Alto area is in serious jeopardy," states Pacific at p.3. Pacific declares that it will not sell the facilities to CCC without appropriate payment and the only possible structure for payment requires Pacific to partially finance CCC's purchase. *Id.* at n.2. Pacific contends that its security interest establishes it as a preferred creditor; in the event of default under the senior obligations, its interest will be subordinate to the interests of senior lenders, whereas, in the event of CCC's default on its obligation to Pacific, then Pacific would have the right to foreclose and force the sale of CCC's assets. *Id.* at pp. 4-5. As to its maintenance during a one-year transition period, Pacific alleges that CCC will not be able initially to provide maintenance for itself on a cost-effective basis. According to Pacific, if the Commission believes that tariffing is required, Pacific is willing to comply. *Id.* at pp. 5-6.

18. Pacific classifies as red herrings both CCTA's plea for an audit, and the "hypothetical effect" on video dial tone which is not remotely related to the channel distribution services provided to CCC. *Id.* at p.7 and n.13. Most significant to the issue of cross-subsidy, states Pacific, is the fact that the costs of facilities have not been included in the calculations for either interstate or state revenue requirements; thus, there is no opportunity for cross-subsidization by telephone ratepayers. Pacific states that it intends to account for the revenue from sale of the

system in the same books of account maintained for the facilities. *Id.* at pp. 7-8. As a provider of services to the public, Pacific alleges that it frequently is required to work out payment arrangements with customers in special circumstances to minimize detriment to either the customer or carrier. Pacific states that CCC was unable to meet the sales and revenue objectives of its business plans and its cash flow was insufficient to keep its payments to Pacific current; therefore, consistent with Pacific's usual business practices for any large customer with financial difficulty, the parties discussed the problem, and CCC's purchase of the facilities evolved as a potential solution.

19. Initially, NCTA did not oppose the Section 214 application, but did oppose Pacific's request for waiver as being unsupported. On November 28, 1990, NCTA submitted an additional pleading in which it offered proposed language which the Commission could utilize in granting a waiver herein. NCTA states in essence that highly unusual circumstances exist in this case in that Pacific seeks to discontinue the provision of video distribution facilities in Palo Alto instead of seeking an initial authorization to finance a cable system which it is constructing, and notes that the record is undisputed that CCC has attempted to obtain a portion of its financing from sources other than Pacific but that Pacific is the only source available. In addition, NCTA notes that because CCC is a not-for-profit cooperative, it faces constraints on its ability to raise equity capital not experienced by for-profit cable systems. NCTA concludes that unless the cross-ownership rules are waived to permit the financing relationship proposed by Pacific, CCC will not be able to provide video programming services in Palo Alto.

VII. DISCUSSION

20. In *National Cable Television Association, Inc. v. FCC*, 914 F.2d 285 (D. C. Cir. 1990), *rehearing denied*, No. 89-1517, December 4, 1990 (*Cerritos*), the court of appeals reviewed the Commission's grant of a waiver request of the prohibition against telephone companies providing video programming in their telephone service areas through an affiliated cable company. In granting a petition for review, the court noted the Commission's policy statement that in considering a particular waiver request the Commission would take explicit notice of the benefits that could flow from joint operation of cable television and telephone facilities if a waiver were granted.[4] The court noted that, before the Commission could grant waiver, "[t]he Cable Act requires the Commission to make a finding that the waiver is 'justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.' 47 U.S.C. § 533(b)(4)."[5] The "policy of this subsection" the court stated, is the prohibition of a telephone company's cross-ownership of a cable facility absent a finding that a community would not otherwise be served by cable or because a waiver is justified by good cause. In *Cerritos*, the court found that the Commission had failed to explain why GTE California Incorporated could not realize the advantages proposed in its application by affiliating with an unrelated contractor, thereby eliminating the cross-ownership problem.

21. In the instant case, we find that the following facts are undisputed:

a. Pacific's waiver request arises as part of its application to discontinue the provision of video distribution facilities in Palo Alto.

b. Pacific, the lessor of the facilities, is proposing to sell the facilities to its lessee, CCC, the cable franchisee in Palo Alto.

c. CCC has attempted to obtain financing from sources other than Pacific for its purchase of the cable facilities, but no alternative to the present financing proposal has been forthcoming.

d. In the event that Pacific is not permitted to partially finance CCC's purchase, the purchase will not occur, and CCC's continued viability as a cable TV provider in the Palo Alto area would apparently be in serious jeopardy, to the possible detriment of cable subscribers in Palo Alto.

22. Based on the foregoing facts, we conclude that grant of a limited, one-year waiver to Pacific would be consistent with the public interest because without that waiver, there would be a substantial likelihood of interruption in service to the community for a significant period of time. Under these circumstances, the advantages to be derived from a waiver cannot be realized in some other manner that avoids the need for a waiver.

23. Initially, we note that Pacific's application seeks authorization to discontinue the provision of channel services to CCC, and ultimately to disengage completely from involvement in the provision of cable television service in the Palo Alto area. Thus, we find that granting Pacific's application would have the ultimate effect of eliminating any opportunity that Pacific might have to take advantage of its control of the conduits and/or telephone poles that are required for the transmission of video programs to cable subscribers. *See General Telephone Co. of the Southwest*, 449 F. 2d 846, 850-851 (5th Cir. 1971).

24. Moreover, we are persuaded by the undisputed facts in this case that our failure to grant a short-term waiver herein would result in an immediate threat to CCC's continued viability, and thus to the continuity of cable service in this area. Given CCC's unsuccessful attempts to obtain alternative financing and the absence of any indication in the record that such financing is available, we are convinced that CCC's viability is in fact in serious jeopardy. While the possibility exists that CCC's demise might result in its replacement with a more financially stable cable television company, there is no evidence that any other cable company is interested in this franchise. Indeed, since May 30, 1990, the date Pacific's application went on Public Notice, no other cable television company has participated in this proceeding. Further, neither of the two major trade associations for cable television companies, NCTA and CCTA, opposes Pacific's waiver request. Thus, the evidence strongly supports a finding that no other cable company is immediately prepared to provide service to Palo Alto if CCC fails, with the result that disruption of cable television service will almost certainly follow, to the detriment of the subscribing public in Palo Alto.

25. We conclude that a temporary waiver is necessary in this case to ensure that subscribers in Palo Alto are not abruptly deprived of cable service in the event CCC fails for lack of financing. However, we believe that Pacific's request for an eight year waiver period would involve

Pacific in an unnecessarily lengthy debtor-creditor relationship of the type specifically barred by § 63.54, n.1. Therefore, we will not grant a waiver of our rules for such a lengthy period. Instead, we will require Pacific to terminate its debtor-creditor relationship with CCC no later than one year from the adoption date of this order. During this one year period, we will require Pacific to come into compliance with our rules. We urge Pacific to move with dispatch in achieving compliance, because we do not intend to grant any extension of the one year period. We are also persuaded by Pacific's argument that its expertise is required for a one year transitional period to provide maintenance for the facilities, and we concur in its position that this non-common carrier offering need not be tariffed. These steps will avoid disruption of service to the subscribers of the Palo Alto cable television system while assuring that the fundamental objectives of our cross-ownership rules are maintained.

26. Thus, "taking into account the policy" of subsection 613(b) of the Cable Act, we conclude that good cause exists to grant Pacific's application and its waiver request, as limited above, to avoid the disruption, and possible deprivation, for an indefinite period of time, of cable television service to subscribers in the Palo Alto area. In these circumstances, we believe that grant of the waiver request as described would be fully consistent with Section 613 (b)(4) of the Act and with the court's guidance in *Cerritos*. We emphasize, moreover, that our waiver is limited, in scope, to Pacific's proposal as set forth in its application and is for a one year duration. Any additional involvement by Pacific in the provision of cable television service in Palo Alto which is prohibited by the rules will be met with the appropriate administrative sanctions. As before, we will require Pacific to maintain separate books of account for the sale and maintenance of the facilities to CCC.

27. One final matter requires discussion. Serious allegations have been raised in this proceeding by CCTA that Pacific's continuation of service after CCC defaulted in payments amounts to a violation of the cross-ownership rules. We are also concerned that any such action by Pacific may have constituted a violation of its tariff as well as the specific conditions in *Pacific Bell, supra*.[6] Because of the apparent urgency of CCC's plight and the need for immediate action on our part on the pending application and waiver request, we will not, at this time, address in this order these complex matters as well as any other possible violations by Pacific that may have occurred in this case. These matters, and appropriate remedial action, if any, will be examined later.

VIII. CONCLUSION

28. We have considered the arguments presented in this proceeding and find that the public interest, convenience and necessity will be served by grant of the application and waiver of our telephone company/cable television cross-ownership rules for one year and that good cause exists for such a waiver. We find that for purposes of the Cable Act and our rules, absent the subject proposal, cable television subscribers would likely face disruption of service for an indefinite period of time in the Palo Alto, California area. In order to assure that any cross-subsidization between Pacific and CCC is readily revealed, we will require Pacific to follow the accounting rules adopted in CC Docket No. 86-111. No costs associated with the construction, operation, use, maintenance or disposition of the Palo Alto cable system shall appear in any Pacific service rate base or as a regulated expense.

IX. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, that Sections 63.54, 63.55, 63.56, 63.62 and 63.505 of our rules ARE HEREBY WAIVED, as limited above, to permit Pacific Bell to sell and maintain the broadband coaxial cable transport facilities as described herein.

30. IT IS FURTHER ORDERED, that the application of Pacific Bell for authorization under Section 214 of the Communications Act of 1934, as amended, to discontinue the provision of channel service to Cable Communications Cooperative of Palo Alto, Inc., IS GRANTED.

31. IT IS FURTHER ORDERED, that grant of the application and waiver petition provided for herein ARE SUBJECT TO THE CONDITIONS set forth in paragraphs 25, 26 and 28, *supra*.

32. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. § 1.103(a), this order is effective upon adoption.

33. Pacific Bell is afforded thirty-one days from the release date of this order to decline this authorization, as conditioned. Failure to respond within that period will constitute formal acceptance of this authorization, as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The reported populations of communities in the service area comprising 130,332 persons are: City of Palo Alto, 57,000; City of East Palo Alto, 18,850; City of Menlo Park, 28,200; City of Atherton, 7,950; unincorporated areas of San Mateo County, 6,732; and Stanford University (unincorporated area of Santa Clara County), 11,600. *See* Agreement of Purchase and Sale between Pacific and CCC (Purchase Agreement) at Exhibit 3.

[2] Pacific stated it would recover its fully distributed costs for construction and maintenance of the proposed facilities through recurring charges, and expected to yield a rate of return on investment slightly greater than 12.75%. MO&O at para. 4. The Commission reported in n.9 of the *Reconsideration* that on September 12, 1986, Pacific amended its application, decreasing its rate of return estimate from 12.75% to between 10 and 11%.

[3] Section 63.54, n.1 provides in pertinent part that:

> . . . [T]he terms "control" and "affiliate" bar any financial or business relationship whatsoever by contract or otherwise, directly or indirectly between the carrier and the customer, except only the carrier-user relationship.

[4] This policy was enunciated by the Commission in *Revision of the Processing Policies for Waivers of the Telephone Company-Cable Television " Cross Ownership Rules, "* 69 FCC 2d 1097, 1110 (1978).

[5] Section 613 of the Cable Act, 47 U.S.C. § 533, provides in relevant part as follows:

(b)(1) It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

* * * * *

(b)(4) In those areas where the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by, operated by, controlled by, or affiliated with the common carrier involved, or upon other showing of good cause, the Commission may on petition for waiver, waive the applicability of paragraphs (1) and (2) of this subsection. Any such waiver shall be made in accordance with section 63.56 of title 47, Code of Federal Regulations (as in effect September 20, 1984) and shall be granted by the Commission upon a finding that the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection.

[6] CCTA also questions the impact of the security interest Pacific proposes to retain if CCC defaults. We will not at this time address the consequences of a hypothetical default. Indeed, the final form of the security interest will not be defined until after senior financing is obtained. In any event, our grant of the waiver herein is premised upon the proposal as presented by Pacific. No material change in the nature of Pacific's participation may occur without prior Commission authorization.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Ameritech Operating Companies — Transmittal No. 483

Revisions to Tariff
F.C.C. No. 2

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 1991; Released: January 28, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. By the captioned filing, scheduled to become effective January 29, 1991, the Ameritech Operating Companies (Ameritech) would offer a 10-digit customer identification function as an option available with 800 Access Service. Ameritech states that this function is made possible through the Common Channel Signaling (CCS) network. The option would use CCS to perform a database query. The database of 800 numbers, housed in the Service Control Point (SCP), contains information identifying the carrier to which Ameritech should route an 800 call and may also include the standard network routable number. Customers would not directly access the database and customer access to the CCS network would not be required. Rather, Ameritech would use the CCS network internally to perform the 10-digit customer identification function. Ameritech Tr. 483, Description and Justification (D&J) at 1-2.

2. The Ameritech transmittal would establish separate Local Transport rate subelements to recover the added costs Ameritech would incur in providing this service. Ameritech would apply new recurring and nonrecurring charges in addition to the normal Feature Group D per minute charges it currently assesses for 800 usage. The recurring charge would be a flat per query charge for each query issued to the database to perform the 10-digit screening function which Ameritech calls the "Data Base Query Charge." Ameritech would also assess a nonrecurring "800 Number Activation Charge" for entering each individual 800 number into the database and an "800 Number Change Charge" to change routing or customer information associated with an 800 number. *Id.* at 2.

II. PLEADINGS

A. Petitions

3. On November 15, 1990, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 483 which raises various cost issues. First, MCI contends, Ameritech has not stated what separations factors it used to allocate investment and expenses associated with this filing to the interstate jurisdiction. MCI Petition at 2-3. MCI also notes that in Transmittal 396 Ameritech would recover the costs of its Signal Transfer Point (STP) port through a flat monthly charge per port. In this transmittal, however, Ameritech would recover STP port costs in its per query charge. MCI contends that users of the same equipment will thus be charged different rates and that this violates the antidiscrimination provisions of Section 202 of the Communications Act, 47 U.S.C. § 202. *Id.* at 3-4.

4. In addition, MCI argues that the cost support information Ameritech has provided is insufficient to demonstrate that the unit costs derived for this service are just and reasonable. Moreover, MCI contends, according to Ameritech's demand and revenue estimates Ameritech will recover less than 5 percent of the annual costs of the service. MCI asserts that Ameritech appears to be projecting demand of 1.8 billion queries over some unspecified period of time but has not justified this projection. *Id.* at 4-5. Finally, MCI contends that Ameritech does not demonstrate that the costs of services performed under the SCP contract are reasonable.[1] *Id.* at 5-6.

5. Allnet, in a petition to investigate Transmittal 483 filed November 15, 1990, asserts that Ameritech's tariff does not contain all relevant terms and conditions of the proposed service. Allnet argues that this constitutes a violation of Sections 202(a) and 203 of the Communications Act, 47 U.S.C. §§ 202(a), 203. Allnet Petition at 1-2. Allnet also contends that lower nonrecurring charges should apply when an interexchange carrier (IC) interacts directly with the Service Management System (SMS), as it is entitled to do, to perform these functions. *Id.* at 2-3. In any event, Allnet argues that Ameritech has provided no cost support for its nonrecurring charges. *Id.* at 3. Allnet also urges us to disallow $1.5 million in costs associated with SMS operation that Allnet claims represents Ameritech's payment to Bell Communications Research. *Id.* at 3-5.

6. Allnet further contends that it is unreasonable for Ameritech to assess the same charge per query when it does not perform 800 number translation as when it does. Allnet estimates that the cost of simply performing carrier identification is only .305 percent of the cost of a query including number translation. *Id.* at 5-6. Finally, Allnet asserts that Ameritech's query cost development fails to set forth the quantities and unit costs associated with the various cost inputs. Allnet concludes that this is a violation of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. *Id.* at 6.

B. Carrier Reply

7. Ameritech filed its opposition on November 26, 1990, responding that its cost support data are adequate. First, Ameritech notes, although it does not specifically state the separations factors it used in developing the rates for this service, it followed the Commission's cost accounting and separations rules. Ameritech further explains that it used a seven-year period to "levelize" costs and demand in setting rates. This process, Ameritech argues, results in a rate that will be more stable over time. Ameritech Reply at 2-4. Ameritech further notes that the costs of the SCP operator contract that it has included in its query charge are the costs associated with maintaining the national data base and updating local SCPs. *Id.* at 4-6.

8. Ameritech also dismisses petitioners' other arguements. First, Ameritech states, the 800 data base query charge recovers costs of STP ports that are internal

to Ameritech's network. In contrast, the flat charge for STP access recovers costs of ports that are dedicated to one customer. Hence, Ameritech concludes, no discrimination arises from the two different cost recovery schemes. *Id.* at 6-7. Ameritech also argues that it does not discriminate against customers that do not require number translation because it incurs the same costs whether it performs number translation or not. *Id.* at 7-8.[2] Finally, Ameritech insists that it has included all relevant terms and conditions in its tariff and that agreements it has negotiated with ICs are merely intended to streamline the service ordering process, not to impose conditions on the use of the service. *Id.* at 8-10.

III. DISCUSSION

9. We reject the captioned transmittal because Ameritech has failed to provide adequate information to comply with Section 61.38 of the Commission's Rules. On the record before us, Ameritech has established no relationship between costs and its rates.

10. The critical deficiency in Ameritech's cost support is its lack of demand projections. Ameritech states that, initially, demand for 800 Access Service with the 10-digit identification function is likely to be rather small. Ameritech states that only about 20 NXXs will be able to use 10-digit customer identification while between 700 and 800 NXXs already have been assigned to ICs. Ameritech D&J at 3-4. Ameritech, however, provides no explanation or data regarding the estimates of demand underlying the unit costs it displays, its anticipated increases in demand or the specific effects of increasing demand over time. [3] For example, Ameritech provides no information concerning the number of 800 Service end users that are likely to rearrange their existing service arrangements in order to take advantage of this new option or of the amount of new demand for 800 Service using the 10-digit customer identification function that it anticipates. Nor does Ameritech provide any estimate of the number of database queries it expects to process. Presumably, Ameritech has performed some analysis that shows increasing demand over time in order to compute its "levelized" rate. None of this information is included in Ameritech's filing, however.[4] Section 61.38 of the Commission's Rules applies to this filing and requires carriers to submit estimates of the effect of tariff revisions on the carrier's traffic and revenues. Ameritech has not complied with this requirement in this case. We therefore find the captioned filing does not comply with applicable rules.

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 483 IS REJECTED.

12. IT IS FURTHER ORDERED that the petition to suspend and investigate filed by MCI Telecommunications Corporation and the petition to investigate filed by Allnet Communications Services, Inc. ARE DENIED.

13. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL ISSUE revisions to their tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

14. IT IS FURTHER ORDERED that Special Permission No. 91-074 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] These functions include updating the SCPs throughout the nation. Ameritech D&J at 9.

[2] Moreover, Ameritech states, it will not apply a nonrecurring charge when customers interact directly with the SMS, so Allnet's concern in this regard is unfounded. *Id.* at 7.

[3] The annual unit costs of $6,483,797 provided by Ameritech, divided by the per query cost of 0.003614 suggest, as MCI notes, annual demand estimates of 1.8 billion. Ameritech, however, fails to provide an explanation for this extremely high level of demand except its statement that it expects a significant increase in demand when ICs must use its 800 database. The only demand data provided by Ameritech are in support of its estimated revenues and that data is inconsistent with of the per unit cost demand derivable from Exhibit 2 of its D&J.

[4] We note also that Ameritech has failed to develop properly its nonrecurring charges. Ameritech provides no information concerning the specific functions associated with the 800 database which presumably were identified in its study of nonrecurring costs. Nor does Ameritech derive specific costs from labor time.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI COMMUNICATIONS CORPORATION,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,	E-90-423
PACIFIC BELL TELEPHONE COMPANY,	E-90-424
NEVADA BELL TELEPHONE COMPANY,	E-90-425
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-426
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-90-427
NEW YORK TELEPHONE COMPANY and NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-442 E-90-443
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-428
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	E-90-429
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-430
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-431
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-432
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-433
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-434
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-435
NEW YORK TELEPHONE COMPANY,	E-90-436
CAROLINA TELEPHONE AND TELEGRAPH COMPANY,	E-90-437
INDIANA BELL TELEPHONE COMPANY,	E-90-439
MICHIGAN BELL TELEPHONE COMPANY,	E-90-440
OHIO BELL TELEPHONE COMPANY,	E-91-19
WISCONSIN BELL, INC.,	E-91-20
PACIFIC BELL TELEPHONE COMPANY,	E-91-21
NEVADA BELL TELEPHONE COMPANY,	E-91-22
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-23
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-24
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-25
CINCINNATI BELL TELEPHONE COMPANY and	E-91-26
GTE SOUTHWEST, INC.,	E-91-27

Defendants.

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICALL SYSTEMS
OF LOUISVILLE,
Complainant,

v.

CINCINNATI BELL TELEPHONE COMPANY,	E-91-006
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-91-007
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-91-008
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-91-009
INDIANA BELL TELEPHONE COMPANY,	E-91-010
MICHIGAN BELL TELEPHONE COMPANY,	E-91-011
NEW YORK TELEPHONE COMPANY,	E-91-012
OHIO BELL TELEPHONE COMPANY,	E-91-013
BELL TELEPHONE COMPANY OF PENNSYLVANIA and	E-91-014
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-91-015
Defendants.	

ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CALL AMERICA INC.,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,
Defendant.

File No. E-90-254

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECULINE OF
SACRAMENTO, INC.,
Complainant,

v.

NEVADA BELL and
PACIFIC BELL
TELEPHONE COMPANY,
Defendants.

File No. E-90-255
File No. E-90-256

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIVERSIFIED OF
TENNESSEE, INC.,
Complainant,

v. File No. E-90-257

SOUTHERN BELL
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE OF WASHINGTON, INC., Complainant,

v.

BELL TELEPHONE OF PENNSYLVANIA,	E-90-287
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	E-90-288
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	E-90-289
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	E-90-290
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	E-90-291
THE DIAMOND STATE TELEPHONE COMPANY,	E-90-292
NEW JERSEY BELL TELEPHONE COMPANY,	E-90-293
INDIANA BELL TELEPHONE COMPANY,	E-90-294
MICHIGAN BELL TELEPHONE COMPANY,	E-90-295
OHIO BELL TELEPHONE COMPANY,	E-90-296
NEW YORK TELEPHONE COMPANY,	E-90-297
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-90-298
PACIFIC BELL TELEPHONE COMPANY,	E-90-299
SOUTH CENTRAL BELL TELEPHONE COMPANY, and	E-90-300
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	E-90-301
Defendants.	

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE
NETWORK, INC.,
Complainant,

v.

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY — File No. E-90-358
and
NEW YORK TELEPHONE COMPANY — File No. E-90-359
Defendants.

ORDER

Adopted: January 28, 1991; Released: February 7, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 17, 1990, the U.S. Court of Appeals for the District of Columbia Circuit granted a petition for review of a Commission order[1] that codified the rules for calculating the rate base used to determine the interstate revenue requirement of dominant carriers.[2] Review was granted with regard to certain exclusions from the rate base mandated by the Commission, and these issues have been remanded for further consideration and explication.

2. In light of the issues raised by the Court's remand, the Commission will hold in abeyance the captioned proceedings until such time as the Commission acts upon the remand.

3. Pleading and discovery filing deadlines will also be held in abeyance.

4. This Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, *Report and Order*, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989).

[2] *Illinois Bell Tel. Co. v. FCC*, No. 88-1175 (D.C. Cir. August 17, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-642

In re Applications of

Silver King Broadcasting of New Jersey, Inc. — BRCT-890119KG

For Renewal of License of
Station WHSE-TV,
Newark, New Jersey

and

Arthur Liu — BPCT-890501KI

For Construction Permit
Newark, New Jersey

HEARING DESIGNATION ORDER

Adopted: November 16, 1990; Released: February 7, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the above-captioned application for the renewal of license of Station WHSE-TV, Channel 68, Newark, New Jersey, filed by Silver King Broadcasting of New Jersey, Inc. (Silver King) and (2) the application of Arthur Liu (Liu) for a new commercial television station on Channel 68, Newark, New Jersey.

2. Liu is also the 100% owner of Multicultural Broadcasting, Inc., an applicant for a new FM station on Channel 290, Newark, New Jersey. Section 73.3555 of the Commission's Rules proscribes the ownership of a television station and a radio station in the same community. Liu has not requested a waiver. Accordingly, an appropriate issue will be specified.

3. Liu's proposed antenna is to be mounted on the tower of AM radio Station WNYC, New York, New York. Consequently, any grant of a construction permit to Liu will be conditioned to ensure that WNYC's radiation pattern is not adversely affected by the construction of the proposed station.

4. Liu proposes to operate from a site located within 250 miles of the Canadian Border with maximum visual effective radiated power (ERP) of more than 1000 kilowatts. The proposal poses no interference threat to United States television stations; however, it contravenes an agreement between the United States and Canada which limits the maximum visual ERP of the United States television stations located within 250 miles of Canada to 1000 kilowatts. Agreement Effectuated by Exchange of Notes, T.I.A.S. 2594 (1952). In the event of a grant of this application, the construction permit shall contain a condition precluding station operation with maximum visual ERP in excess of 1000 kilowatts, absent Canadian consent. South Bend Tribune, 8 R.R.2d 416 (1966).

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. In the event that Multicultural Broadcasting, Inc. is the ultimate permittee in MM Docket No. 84-131, to determine whether the application of Arthur Liu is consistent with Section 73.3555 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the rule.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Liu, the construction permit shall be conditioned as follows:

Prior to construction of the tower authorized herein, permittee shall notify AM Station WNYC so that, if necessary, the AM station may determine operating power by the indirect method and request temporary authority from the Commission in Washington, D.C. to operate with parameters at variance in order to maintain monitoring point field strengths within authorized limits. Permittee shall be responsible for the installation and continued maintenance of detuning apparatus necessary to prevent adverse effects upon the radiation pattern of the AM station. Both prior to construction of the tower and subsequent to the installation of all appurtenances thereon, a partial proof of performance, as defined by Section 73.154(a) of the Commission's Rules, shall be conducted to establish that the AM array has not been adversely affected and, prior to or simultaneous with the filing of the application for license to cover this permit, the results submitted to the Commission.

8. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Arthur Liu, the construction permit shall be conditioned as follows:

Subject to the condition that operation with effective radiated power in excess of 1000 KW is subject to the consent of Canada.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760.00 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara Kreisman, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] Liu's application for FM channel 290 was designated for hearing, along with five competing applications, in MM Docket No. 84-131 (1984), 49 Fed. Reg. 6994 (1984). Mr. Liu was not the preferred applicant under either the initial decision or the subsequent Review Board decision. On April 28, 1989, a settlement agreement and a related petition was filed with the Commission proposing to resolve the matter. The Commission approved the settlement agreement on March 14, 1990, in which Liu's application was dismissed. *See Las Americas Communications, Inc.*, 5 FCC Rcd 1634 (1990). However, on April 16, 1990, Liu filed a "petition For Reconsideration and Restoration of Application to Hearing Status." Liu's petition and similar petitions from several of the other applicants are pending before the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-641

In re Applications of

WPIX, Inc. File No. BRCT-890201LL

For Renewal of License of
Station WPIX(TV), New York, New York

and

CHALLENGERS OF NEW JERSEY, INC. File No. BPCT-890501KH

For Construction Permit
New York, New York

HEARING DESIGNATION ORDER

Adopted: November 29, 1990; Released: February 7, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for the renewal of license of station WPIX(TV), New York, New York, filed by WPIX, Inc., and the mutually exclusive application of Challengers of New Jersey, Inc. (Challengers) for a new commercial television station to operate on Channel 11, New York, New York.

2. William McCreary, holds a 20% equity interest in Challengers. Mr. McCreary is a host, executive producer and vice president of television station WNYW, New York, New York. Mr. McCreary's position as a officer in WNYW raises a multiple ownership question. However, Mr. McCreary has represented to the Commission that he will terminate all connection with WNYW if Challengers is the successful applicant. Accordingly, any grant of a construction permit to Challengers will be conditioned upon Mr. McCreary's severance of all connection with station WNYW, New York, New York.

3. Challengers indicates in its application that it is in the process of obtaining financing. However, as of this date, Challengers has not amended its application to provide the required financial certification. Accordingly, Challengers will be given 20 days from date of release of this order to review its financial proposal in light of Commission requirements, to make changes that may be necessary, and if appropriate, to submit a certification to the Administrative Law Judge in the manner called for in Section III, Form 301, as to its financial qualifications. If Challengers cannot make the required certification, it shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

4. Except as indicated by the issues specified below, the applicants are qualified. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That in the event of a grant of Challengers of New Jersey, Inc.'s application, the construction permit shall be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that William McCreary has severed all connection with the licensee of television station WNYW, New York, New York.

7. IT IS FURTHER ORDERED, That Challengers of New Jersey, Inc. shall, within 20 days of the release of this Order, submit a financial certification in the form required by Section III, FCC Form 301, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of

LEIBENSPERGER FM, INC. (hereafter "Leibensperger")	File No. BPH-880812MV
SBM COMMUNICATIONS, INC. (hereafter "SBM")	File No. BPH-880816MM
HOMEWOOD ASSOCIATES (hereafter "Associates")	File No. BPH-880816MN
HOMEWOOD FM BROADCASTING (hereafter "Homewood FM")	File No. BPH-880816MV
HEIDI DAMSKY (hereafter "Damsky")	File No. BPH-880816MW
GEORGE W. BARBER, JR. (hereafter "Barber")	File No. BPH-880816MY
ROXY COMMUNICATIONS, INC. (hereafter "Roxy")	File No. BPH-880816NB
GEORGE I. O'REAR (hereafter "O'Rear")	File No. BPH-880816NL
CARTER-SIGMON, INC. (hereafter "Carter")	File Bo. BPH-880816NP
WEDA, LTD. (hereafter "WEDA")	File No. BPH-880816NR
WILLIE HUFF, DEBORAH HUFF AND ADRIENNE F. LEE, A PARTNERSHIP, d/b/a HOMEWOOD PARTNERS (hereafter "Partners")	File No. BPH-880816NU
SOUTHERN BROADCASTING LIMITED PARTNERSHIP (hereafter "Southern")	File No. BPH-880816NW
HOMEWOOD COMMUNITY BROADCASTERS, LTD. (hereafter "Homewood Community")	File No. BPH-880816OQ
PAMELA R. JONES (hereafter "Jones")	File No. BPH-880811MJ (PREVIOUSLY RETURNED)
WYSE BROADCASTING LIMITED PARTNERSHIP (hereafter "WYSE")	File No. BPH-880816MP (DISMISSED HEREIN)

For Construction Permit for a New FM Station on Channel 247A in Homewood, Alabama

HEARING DESIGNATION ORDER

Adopted: December 27, 1990; Released: February 7, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On August 11, 1988, Jones tendered an application on Channel 247A to serve Homewood, Alabama. That application was returned as unacceptable for filing by staff letter of April 27, 1990, for failure to fully comply with the Commission's multiple ownership and inconsistent application rules, 47 C.F.R. §§ 73.3555(a) and 73.3518.

3. On May 29, 1990, Jones timely filed a petition for reconsideration of our action returning her application. Therein, Jones asserts that the staff failed to acknowledge her contemporaneous divestiture commitment, which thus precluded dismissal of any of the applications she filed on August 11, 1988 for being in violation of the multiple ownership and inconsistent application rules. In her application for a new FM station in Lexington, Kentucky, filed on the same date as the Homewood, Alabama application, Jones made a divestiture promise to divest herself of her "minority" interest in a pending Carlsbad, New Mexico application, filed by Carlsbad Communications Partners ("Carlsbad"), *if* her application for a new station in Lexington, Kentucky was granted. Jones further asserts that: (i) the staff failed to note that her interest in the Carlsbad, New Mexico application is in the nature of a "minority" partnership interest; and (ii) by failing to note the divestiture promise and the "minority" nature of Jones' interest in Carlsbad, the staff wrongly concluded that Jones' Homewood, Alabama application, which she

filed as a sole proprietor, and the Carlsbad, New Mexico application, in which she is a "minority" general partner, were inconsistent within the meaning of *Big Wyoming Broadcasting Corp.* 2 FCC Rcd 3493 (1987). Jones also claims that her Homewood, Alabama application and the Carlsbad, New Mexico application are not "inconsistent" within the meaning of Section 73.3518 of the Commission's rules because---by definition---two applications are "inconsistent" only if one may not be granted; and there is no violation of that Section if a timely promise to divest an interest will prevent any potential multiple ownership rule violation.

4. Initially, we note that Jones' argument that her timely promise to divest interest cured any potential multiple ownership rule violation is misplaced. Her promise to divest interest in the Lexington, Kentucky application was clearly a contingent promise to divest. Such an equivocal promise to divest interest in a pending application does not cure the violation of the inconsistent application rule occasioned by the filing of the Homewood application. We reaffirm our conclusion that Jones' filing of the instant application is in violation of the Commission's multiple ownership and inconsistent application rules, 47 C.F.R. §§ 73.3555(a) and 73.3518, as they have been applied under our current FM "hard look" processing procedures. *See Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936, 19940 (May 13, 1985). Paragraph 24 of the *Report and Order* in MM Docket No. 84-750, *supra*, indicates that:

> As an additional component of our "hard look" approach, we reiterate our position with respect to multiple applications. Applicants will not be permitted to "flood the Commission's processing line and hearing docket with multiple applications, many of which could not be granted under our multiple ownership rules." *Storer Broadcasting CO.*, 43 FCC 1254, 1256 (1953). Accordingly, we shall regard Section 73.3555 as establishing the maximum number of applications acceptable for filing by an applicant. Applications tendered in excess of this number shall be considered inconsistent with Section 73.3518 and returned as unacceptable for filing. In this regard, we note that stations in which the applicant currently holds a *cognizable* interest would be taken into account in determining the maximum number of acceptable applications. [27] (emphasis supplied)
>
> [27] In the event that multiple applications exceeding the prescribed limits are filed on the same day, the Commission will sequentially consider them in whatever order they are reached on the processing line until the multiple ownership limit is reached. Any remaining applications will be returned.

It is clear from the above statement that the Commission intended that under the "hard look" processing criteria no applicant having a cognizable, *i.e* attributable, interest in either existing facilities or pending applications will be permitted to file any additional applications which would exceed the multiple ownership rule attributable limit.

5. We realize that pre- "hard look" policies as set forth in *Big Wyoming* and the cases cited therein enabled FM applicants to file in excess of the multiple ownership rule limits so long as the pertinent party held less than a majority of the voting stock in applications above the allowable limit. However, we believe it clear that the Commission, under the "hard look" processing standards, intended to close this loophole, which enabled applicants holding an attributable interest in more than 12 applications to have others pending without triggering the inconsistent application and multiple ownership rules. Jones' interpretation, taken to its logical extreme, would mean that she could have filed as a 49% general partner in each of the nearly 1400 filing windows opened since the inception of the hard look processing standards. This is a patently absurd result.

6. It is well established that the Commission may change a prior policy or standard if a reasoned analysis for such change is provided.

> An agency's view of what is in the public interest may change either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

Greater Boston Television Corporation v. FCC, 444 F. 2d 841, 852 (D.C. Cir. 1983). The reasoned analysis for the changes wrought by the "hard look" processing system has been often stated:

> First, the reduction of frivolous and speculative applications will enable [the Commission] to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

Star Signal Corporation, 1 FCC Rcd 450, 451 (1986). Processing numerous applications which are not grantable under the multiple ownership rules disserves each of these "hard look" goals.

7. The United States Court of Appeals for the District of Columbia Circuit in an analogous context has stated:

> The Commission, in an intervening proceeding, has determined that the policy previously applied in cases like this one no longer serves the public interest, convenience and necessity, and therefore will not be applied henceforth. We hold that in such circumstances an agaency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest.

Washington Association for Television and Children v. FCC, 665 F. 2d 1264, 1268 (D.C. Cir. 1981) (footnote omitted); *see also, Arnold L. Chase (WTIC-TV)*, 5 FCC Rcd 1642, 1646 (1990) (application of a subsequently adopted waiver standard). We believe that the court's rationale is equally applicable in this case. *Big Wyoming* did not interpret the Commission's multiple ownership rules in light of the attribution standards adopted in *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *reconsidered in part* 58 RR 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986).[1] Neither did *Big Wyoming* purport to interpret the "hard look" processing standards in this regard. Rather, *Big Wyoming* spoke only to policies which were in effect at the time (1983) of the filing of the applications in question. Thus, the cases cited by Jones to substantiate her claim that she was not in violation of the inconsistent application rule do not support that contention. When Jones filed the Homewood, Alabama application, she had cognizable interests in 12 other applications.[2] Therefore, this application, her thirteenth, must be dismissed pursuant to Paragraph 24 of the *Report and Order* in Docket 84-750. Accordingly, Jones' petition for reconsideration will be denied.

8. On February 27, 1990, WYSE filed a notice of voluntary dismissal of its application. WYSE also provided the staff with a declaration, dated February 4, 1990, made under penalty of perjury, that neither WYSE, nor any of its general or limited partners have been paid or promised any money or any other consideration whatsoever in connection with the voluntary dismissal of its application for Homewood, Alabama. Because WYSE has complied with 47 U.S.C. § 311(c)(3) and 47 C.F.R. § 73.3525(a), its application will be dismissed herein.

9. Homewood Community's application proposes facilities of 1.60 kW effective radiated power (ERP) at an antenna height above average terrain (HAAT) of 153 meters. However, the staff's engineering review indicates that this ERP/HAAT combination exceeds the 3.0 kW ERP/100 meter HAAT limit for a class A station. [3] For the proposed 153 meter HAAT, the staff has determined that the ERP must be limited to 1.30 kw in order to achieve facilities equivalent to 3.0 kw ERP/100 m HAAT. In this case, the discrepancy is neither a tenderability nor an acceptability defect insofar as the the minimal nature of the defect appears attributable to the imprecision inherent in manually asertaining from the Commision's propagation curves that exact radiation value corresponding to the maximum permitted under the rules. Accordingly, Homewood community must amend its application within 30 days of the release of this *Order* to specify an effective radiated power of 1.30 kW.

10. *Roxy*. An engineering study of Roxy's application reveals a discrepancy in the tower height above ground level (AGL) and above mean sea level (AMSL), in Section V-B, Item 7. The application shows the overall tower height to be 91 meters AGL and 402 meters AMSL. The Commission's records show the tower height to be 121.3 meters AGL and 432.2 meters AMSL. Since this is an existing tower on file with the Commission, the discrepancy is neither a tenderability nor an acceptability defect. Accordingly, Roxy will be required to correct the AGL and AMSL values listed in Section V-B, Item 7.

11. Homewood FM does not indicate whether its main studio will be inside or outside the proposed 3.16 mV/m contour, as required by 47 C.F.R. § 73.1125. Accordingly, an issue will be specified.

12. Information before the Commission indicates that Leibensperger was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Leibensperger's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Leibensperger's in this proceeding.

13. Debra Ann Brennan, sole principal of Roxy, is a marketing consultant for Radio station WKXX(FM), Birmingham, Alabama. Birmingham and Homewood are in close enough proximity that Ms. Brennan's ownership interest in this facility and her management interest in WKXX(FM) could violate the Commision's cross-interest policy. However, Ms. Brennan has indicated her intent to terminate her relationship with station WKXX(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Roxy's application, Ms. Brennan will be required to sever connections with station WKXX(FM), Birmingham, Alabama prior to the commencement of program test authority.

14. *Financial*. The material submitted by the applicants below does not demonstrate their financial qualifications. Accordingly, an issue will be specified concerning the following deficiencies.

APPLICANT	DEFCIENCY
WEDA	Applicant certifies that it is not financially qualified, but will secure such a committed source and will amend its application at the appropriate time to reflect this fact. No amendment was filed.
Partners	Applicant certifies that it is not financially qualified, but is in the process of obtaining appropriate financing and will amend this application when the process is complete. No amendment was filed.

15. It should be noted that due to the late tenderability period opened on May 7, 1990 by applicant Homewood Community, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43517 (1985).

16. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch, Homewood FM, Roxy, and Carter-Sigmon have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Homewood FM, Roxy, and Carter-Sigmon would constitute a hazard to air navigation, an issue with respect to each applicant will be included and the FAA made a party to the proceeding.

17. Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. SBN has not completed Item 4 correctly. SBM's application gives a post office box number as the residence address for William G. Brown, Clifton G. Moor and James E. Martin, Jr. Accordingly, SBM must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

18. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Leibensperger.

2. To determine whether Leibensperger's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether Leibensperger possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine, with respect to WEDA and Partners, whether the applicants are financially qualified.

5. To determine, pursuant to Section 73.1125, whether good cause exists for the proposed location of its main studio outside the station's 3.16 mV/m contour by Homewood FM.

6. To determine whether there is a reasonable possibility that the tower height and location proposed by Homewood FM, Roxy, and Carter-Sigmon would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Pamela R. Jones IS DENIED.

22. IT IS FURTHER ORDERED, That the application of WYSE is hereby DISMISSED.

23. IT IS FURTHER ORDERED, That in accordance with paragraph 10 hereinabove, Roxy shall submit the corrected information to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief Audio Services Division.

24. IT IS FURTHER ORDERED, That Homewood Community shall file an amendment specifying an effective radiated power of 1.30 kW with the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That in the event of grant Roxy's application, Debra Ann Brennan shall divest herself of all interests in and sever all connections with Station WKXX(FM), Birmingham, Alabama, prior to the commencement of program test authority.

26. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

27. IT IS FURTHER ORDERED, That SBM shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

28. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Com-

munications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

29. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

30. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] We must point out that the *Attribution* orders did not alter the Commission's treatment of general partnership intersts, which traditionally have been attributable under the multiple ownership rules. 97 FCC 2d at 1022. However, paragraph 24 of the *Report and Order* in Docket 84-750 for the first time makes the application of the inconsistent application and multiple ownership rules hinge on attribution rather than majority control of corporations.

[2] These were: Modesto, California (BPH-880301OY); Carlsbad, New Mexico (BPH-880323MK); Fort Wayne, Indiana (BPH-880421MR); Olathe, Kansas (BPH-880421NK); Macon, Georgia (BPH-880421NL); Virginia Beach, Virginia (BPH-880505NR); Bixby, Oklahoma (BPH-880602OK); Roanoke, Virginia (BPH-880602OL); Brownsburg, Indiana (BPH-880725MF); Ellettsville, Indiana (BPH-880725ML), Dismissed August 2, 1990; Lexington, Kentucky (BPH-880811MG); and Bethalto, Illinois (BPH-880811MP), Dismissed May 17, 1990.

[3] At the time of filing, 47 C.F.R. § 73.211 did not permit a Class A station to exceed the equivalent of 3.0 kw ERP/100 m HAAT. The *Second Report and Order* in Docket 88-375, 4 FCC Rcd 6375 (1989) mofified the maximum Class A limit to 6.0 kw ERP/100 m HAAT for those Class A Stations meeting increased spacing restrictions adopted for 47 C.F.R. § 73.207. However, this application is not entitled to be considered under the revised rules (due to a new 3.2 km short-spacing that would be created to construction permit BPH-860903MI, held by WKZM, Dadeville, Alabama) and is therefore limited to maximum facilities of 3.0 kw ERP/100 m HAAT per 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 7, 1991

CINCINNATI BELL FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On January 2, 1991, Cincinnati Bell filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. Parties may file comments on the proposed revisions to the cost manual no later than **March 1, 1991.** Replies should be filed by **March 18, 1991.** A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Ed Dashkin, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-205

In the Matter of

Amendment of Part 80 of the Rules to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinator for the Puget Sound Area and to establish procedures for recognizing frequency coordinators in the future. RM No. 6886

REPORT AND ORDER

Adopted: January 22, 1991; Released: February 7, 1991

By the Commission:

I. INTRODUCTION

1. This Report and Order amends the Maritime Services Rules, 47 C.F.R. Part 80, to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinating committee for very high frequency (VHF) private coast stations located in the Puget Sound area and establishes procedures for recognizing frequency coordinators in the future.

II. BACKGROUND

2. On April 10, 1990, we adopted a *Notice of Proposed Rule Making* in the above captioned proceeding, 5 FCC Rcd 2461, which proposed recognizing NPMRC as the frequency coordinator for the Puget Sound area. Marine VHF frequencies in areas with significant boating activity are congested. Congestion in these areas is especially heavy on frequencies available for private coast stations because these frequencies are available on a shared basis, are limited in number, and are used by a large group of eligibles.[1] The Commission's Rules allow for the recognition of frequency coordinating committees to assist applicants for private coast stations in requesting frequencies that will result in the least amount of interference to other proposed and existing stations.[2] Further, while there is no general coordination requirement for licensing private coast stations, applicants desiring to locate in an area served by a Commission recognized frequency coordinating committee must submit with their license applications a report indicating the degree of probable interference. The report may be based on their own field studies or on statements from the frequency coordinating committee. [3]

3. Under the current rules, organizations desiring to be recognized as frequency coordinating committees must submit their requests to the Commission. Such requests must describe the composition of the committee, the area to be coordinated, and how the organization is representative of all persons who are eligible for VHF private coast stations in the area in question.[4] To date, the Commission has recognized one such coordinating committee, the Southern California Marine Radio Council (SCMRC), for the heavily congested Southern California area.[5]

III. DISCUSSION

4. NPMRC filed the only comments received in this proceeding. No reply comments were filed. NPMRC points out that the private coast station channels in the Puget Sound area are heavily congested, with approximately 400 private coast stations currently licensed in the area. The benefits of employing frequency coordinating committees to minimize interference in areas where many users operate on shared frequencies, as is the case here, are well recognized. Our experience with coordinating private coast stations in the Marine Services supports employing such committees in the frequency selection process in other congested areas.[6] Further, we have NPMRC's showing, which indicates that NPMRC is representative of private coast station users in the area.[7] Finally, applicants have an alternative to going through a frequency coordinator. In lieu of submitting its application through NPMRC, an applicant may at its option submit a report, based on a field study, indicating the degree to which a grant of its application would cause interference to existing stations operating in the area.[8] For these reasons, we are amending Section 80.514 of the Rules, 47 C.F.R. § 80.514, to specify NPMRC as the marine VHF frequency coordinating committee for private coast stations operating in the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

5. We are also adopting new procedures for recognizing coordinating committees. If the demand for private coast stations continues to increase, we anticipate receiving additional requests from organizations for recognition as frequency coordinating committees. In fact, the rapidly increasing demand for marine communications coupled with the increasing sophistication in technology may make coordination in the future more necessary if licensees are to continue operating in an efficient manner. Because coordinating committees can provide valuable assistance in the licensing process, and because applicants will have an alternative method of meeting coordination requirements (*i.e.*, a field study), we see no need to conduct a rule making proceeding for every request for recognition as a frequency coordinating committee for private coast stations. We are, therefore, establishing procedures for processing future requests for recognition as frequency coordinating committees. We will place all such requests on public notice and allow thirty days for comments. If the organization meets the provisions of Section 80.513(c)(2) and no substantive issues are raised in comments, a notice and comment proceeding will be considered unnecessary. The Chief, Private Radio Bureau, may, under delegated authority, issue an order adding the organization to the list of recognized coordinating committees under Section 80.514. Section 0.331 of the Commission's Rules will be amended to permit such action under delegated authority. If, however, substantive issues or novel questions of policy or law are raised in the public notice period, the matter will be referred to the

full Commission. Because this amendment relates to agency organization and procedure, notice and comment procedures are unnecessary. *See* 5 U.S.C. § 553(b)(3)(A).

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

6. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our final analysis is as follows:

7. *Reasons for Action*. This action is being taken to coordinate VHF frequency assignments of private coast stations in the Puget Sound area.

8. *Objectives*. This action will reduce interference to new and existing private coast stations.

9. *Legal Basis*. The proposed action is authorized under Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

10. *Reporting, Recordkeeping and Other Compliance Requirements*. Private coast station applicants are now being required to include in their applications for new or modified stations a field study or a statement from the recognized frequency coordinating committee. Currently, frequency coordination is not required in the Puget Sound area.

11. *Federal Rules which Overlap, Duplicate, or Conflict with this Rule*. None.

12. *Description, Potential Impact, and Number of Small Entities Involved*. The only impact of this action will be on private coast station applicants and licensees. While the requirement is an incremental addition to the application, the Commission expects the proposals to be beneficial to small entities in light of the reduced interference potential. There are currently approximately 400 licensees providing private coast station service in the Puget Sound area.

13. *Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the Stated Objective*. The applicant will have the option of submitting a field study report as an alternative to obtaining a frequency coordination recommendation from a recognized frequency coordinating committee.

14. The rules contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new information collection requirements on the public and will not increase or decrease burden hours imposed on the public.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, effective **March 22, 1991,** Parts 0 and 80 of the Commission's Rules, 47 C.F.R. Parts 0 and 80, ARE AMENDED as set forth below. Authority for this action is found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

16. IT IS FURTHER ORDERED that a copy of this Report and Order be sent to the Chief Counsel for Advocacy of the Small Business Administration.

17. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 0 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 0 - COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.331(a)(1) is amended by adding a new sentence at the end to read as follows:

§ 0.331 Authority delegated.

(a) * * *

(1)*** Also, the addition of new Marine VHF frequency coordinating committee(s) to Section 80.514 of the Rules need not be referred to the Commission if they do not involve novel questions of policy or law.

* * * * *

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.514 is amended by adding a new paragraph (b) to read as follows:

§ 80.514 Marine VHF frequency coordinating committee(s).

* * * * *

(b) The North Pacific Marine Radio Council serves the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

FOOTNOTES

[1] Private coast stations serve the operational, maritime control, and business needs of ships by providing a ship-to-shore communications service. They are not open to public correspondence. *See* Section 80.5 of the Rules, 47 C.F.R. § 80.5.

[2] The functions of such coordinating committees are purely advisory and any recommendations are not binding on either applicants or the Commission. *See* Section 80.513(c)(2) of the Rules, 47 C.F.R. § 80.513(c)(2).

[3] *See generally* Section 80.513 of the Rules, 47 C.F.R. § 80.513.

[4] 47 C.F.R. § 80.513(c)(2).

[5] 47 C.F.R. § 80.514(a).

[6] For example, the Southern California Marine Radio Council is the Commission-recognized coordinator for private coast stations in the Southern California area. We are not aware of any serious problems resulting from its coordination efforts.

[7] In the past the Commission has placed special emphasis on coordinating committees being representative of the end users. *See* Report and Order, PR Docket 83-737, 51 Fed. Reg. 14993 (April 22, 1986).

[8] *See* Section 80.513(a) of the Rules, 47 C.F.R. § 80.513(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-11

In re Applications of

James W. Johnson (hereafter "Johnson")	File No. BPH-890927MD
Jo-Lo Broadcasting (hereafter "Jo-Lo")	File No. BPH-890927MF
Richard H. Riggs and Charles H. Hutchinson (hereafter "Riggs")	File No. BPH-890928ME
James E. Browne (hereafter "Browne")	File No. BPH-890928MG
Englewood Broadcasting, Inc. (hereafter "EBI")	File No. BPH-890928MH
The CrossChannels Group, Inc. (hereafter "CrossChannels")	File No. BPH-890928MI
LC Communications Group, Inc. (hereafter "LC Communications")	File No. BPH-890928MK
Voice For Christ Interdenonimational Church (hereafter "Christ")	File No. BPH-890928ML
Central Broadcasting Company, A Limited Partnership (hereafter "Central")	File No. BPH-890928MM
Knight Radio, Inc.	File No. BPH-890927ME (HEREIN DISMISSED)

For Construction Permit
for a New FM Station
on Channel 233A (94.5 MHz)
in Englewood, Ohio

HEARING DESIGNATION ORDER

Adopted: January 25, 1991; Released: February 7, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Knight.* Knight asked for dismissal of its application pursuant to a request dated May 1, 1990. The request included a declaration, as provided for in Section 73.3525(c) of the Commission's Rules, 47 C.F.R. Section 73.3525(c), that no consideration has been promised or received by Knight in connection with its withdrawal. Accordingly, Knight's application will be dismissed pusuant to Section 73.3568 of the Rules, 47 C.F.R. Section 73.3568(a).

3. *Riggs.* Riggs indicated in its application, Section III, Item 2, that it estimates the total funds necessary to construct and operate the requested facility for three months without revenue at $180,000. In response to Item 3, Riggs indicated that the Huntington National Bank, Lima, Ohio, is the source of $100,000 of such funds. Riggs did not account for the source of the additional $80,000. Exhibit 8 to the application, a copy of a letter from the referenced bank, indicated (1) that one of Riggs' principals, Charles Hutchinson, had an unsecured line of credit for an undisclosed amount and (2) that the other principal, Richard Riggs, has a $60,000 line of credit.

4. The Commission has strengthened its financial certification requirements in the context of its *Report and Order* in General Docket No. 88-328 to insure that applicants have carefully considered their financial qualifications. *In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853 (1989). In so doing, the Commission amended Section II of Form 301, asking applicants (1) to state the total estimated funds necessary to construct and operate for three months without revenue and (2) to state the source of such funds. 4 FCC Rcd at 3859. At the same time, the Commission directed its staff to designate an appropriate issue against an applicant to be resolved in the hearing process in situations where there exists a "facial quantitative deficiency," such as "failing to identify adequate funding sources to cover the estimated costs." 4 FCC Rcd at 3859. Accordingly, insofar as Riggs fails to identify funding sources for the stated estimated costs of construction and operation, an issue will be designated.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENT FILED
Johnson	December 18, 1990
CrossChannels	June 5, 1990

6. *EEO*. In response to Section VI, FCC Form 301, Jo-Lo and Central indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by Jo-Lo and Central are deficient in that they fail to identify at least one female-oriented and one minority recruitment source, respectively.[1] Accordingly, Jo-Lo and Central will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Since no determination has been received from the Federal Aviation Administration as to whether the antennae proposed by Johnson, by Jo-Lo, by Browne, by LC Communications, or by Christ would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Johnson, by Jo-Lo, by Browne, by LC Communications, or by Christ would constitute a hazard to air navigation.

2. To determine with respect to Riggs, whether the applicant is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the application of Knight Radio, Inc. IS DISMISSED.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Johnson and CrossChannels ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Jo-Lo and Central shall submit Section VI information in accordance with the requirements of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An organization which Jo-Lo lists as a recruitment source, the Ohio State Administrative Services Division of Equal Employment-Minority Business Office, Central State University, Wilberforce, Ohio, is unfamiliar to the staff as a source of female recruitment. Organizations listed by Central, the Nat. Media Coalition, Central State University, and Professional Women's Organization, are unfamiliar to the staff as sources of minority recruitment. In the event that these organizations satisfy the female and minority recruitment requirements, Jo-Lo and Central may amend their EEO programs to describe them.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — Transmittal No. 425

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: January 29, 1991; Released: January 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 1, 1990, National Exchange Carrier Association, Inc., filed Transmittal No. 425, to revise its carrier common line (CCL) rates through June 30, 1991. On November 16, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate Transmittal 425. On November 16, 1990, American Telephone and Telegraph Company (AT&T) filed a petition regarding the January 1, 1991 Access Tariff Revisions and Transmittal No. 425. NECA filed its reply on November 29, 1990. Transmittal 425 is scheduled to become effective on January 30, 1991. For the reasons discussed below, we reject Transmittal 425.

II. BACKGROUND

2. NECA states that the CCL rate increases reflect higher common line (CL) cost trends not anticipated by NECA in its recent Annual Filing.[1] Description and Justification, Transmittal 425, at 1. This transmittal would result in increases of $1.5 million in NECA pool carrier common line charges and $33.9 million in Long Term Support. The basis for the revised cost projections is the submission of cost company revenue requirement estimates for the 1989 past year cost of service (PYCOS), and for the July 1990 through June 1991 test period forecasts. At the time NECA submitted its Annual Filing it did not have final settlement data for 1989, and relied on 1988 cost studies. *Id.* at 3. Since that time NECA has received over two hundred 1989 cost studies. According to NECA, the new studies show that the Annual Filing underestimated both the 1989 PYCOS cost company revenue requirements and the 1990 and 1991 forecasted growth rates and cost levels. *Id.* at 4. The filing also reflects revised estimates for other billing and collection (OB&C) expenses assigned to the CL element for 1989, 1990, and 1991. *Id.* at 5.

3. According to NECA, factors contributing to the increased costs shown in the 1989 studies include higher depreciation expenses, telecommunications infrastructure improvements, and higher costs of employee benefits. *Id.* at 2. In addition, the filing includes a larger allocation of OB&C expenses to the CL element, due to the introduction of user counts to calculate the allocation. *Id.* at 5. NECA claims that without the revised CCL rates to reflect changes in cost company revenue requirements, earnings based on the Annual Filing data will be 10.32 percent. *Id.* at 6.

III. PLEADINGS

A. Petitions

4. AT&T argues that Transmittal 425 should be rejected, or in the alternative, suspended and investigated, on the grounds that NECA has not provided the cost support to justify these rate increases. AT&T Petition at 12.

5. MCI presents three arguments for rejection or suspension of Transmittal 425. First, MCI argues that NECA has failed to supply all of the studies needed to evaluate the reasonableness of the proposed rate increases. MCI Petition at 3. For example, MCI complains that the NECA data for plant specific, plant non-specific, and marketing expenses show large increases in 1989 with no explanation. *Id.* Second, MCI contends that NECA's forecasted increase in OB&C payments is unsupported. MCI argues that the NECA revision must be due to a change in the separations rules,[2] but NECA does not quantify the change in OB&C due to this rule change. *Id.* at 4. Third, MCI argues that NECA has not explained the increased forecast for corporate operation expenses. *Id.* at 5. In addition, MCI questions the overall veracity of NECA's data given the Commission's recent audit of NECA and the ongoing independent audit. *Id.* at 5-6.

B. NECA Reply

6. NECA responds that the forecasts from its Annual Filing need to be updated because of the receipt of more current information on costs to its member companies. NECA states that it used February 1990 pool settlement data for the Annual Filing. NECA Reply at 9 n.26. Since then companies have been incorporating 1989 cost study data in their settlements and NECA now has data through August 1990, which it used for this filing. *Id.* at 9-10.

7. Regarding MCI's challenges on specific cost items, NECA argues that it is inappropriate to focus on the changes for each Tariff Review Plan (TRP) line item (*e.g.*, marketing, plant specific and non-plant specific expenses) since the cost data reported to NECA for pooling are at an aggregate level, and NECA must then break the data into TRP item entries. *Id.* at 6-7. NECA claims it used the same methodology to develop costs for Transmittal 425 it used in its Annual Filing. *Id.* at 7-8. NECA further argues that there is no connection between the Commission's audit of NECA and the data used in Transmittal 425. *Id.* at 15.

8. Finally, NECA argues that it should be allowed to employ a user count methodology for calculating allocations of OB&C costs associated with the billing and collection of subscriber line charges. NECA had been using a 5 percent allocation limit until September 1990, when it began allowing pooling companies to allocate based on user count methodology. According to NECA, the change from a 5 percent allocation to one based on user counts results in an increase in OB&C expenses allocated to End User Common Lines (EUCL) of $14.4 million in 1989 and $15.1 million for the 1990/1991 test period. *Id.* at

13-14. NECA argues that reliance on user counts is appropriate since the Commission's Rules are silent on the means that can be used to develop the EUCL portion of OB&C. [3] *Id.* at 13. NECA further argues that the rules do not limit OB&C to 5 percent, and that user count methodology fulfills the requirement for carriers to support OB&C expenses over 5 percent. *Id.* at 13-14 nn. 39 & 40.

IV. DISCUSSION

9. The Bureau has previously considered and denied claims that local exchange carriers (LECs) may allocate more than 5 percent of their Other Billing and Collection expenses to the CL element. This issue was most recently raised in regard to the LECs' 1990 Annual Access Tariff filings. In the *1990 Access Order*, the Bureau reiterated that a 5 percent allocation is the applicable standard, and ordered disallowances of all OB&C costs above a 5 percent allocation in ten study areas.[4] Specifically, the Bureau stated:[5]

> While the LECs argue the Commission's Part 69 rules do not prescribe a 5 percent limit on the amount of these billing and collection expenses that can be assigned to the Common Line element, we believe that the burden is on the carriers adequately to support projections that are above the industry standard.

In reviewing the cases presented by the LECs in that proceeding, the Bureau found that none of them had provided sufficient justification for deviating from the industry standard, and thus did not accept their proposed OB&C allocations.

10. After reviewing Transmittal 425 and the reply comments of NECA, we do not believe that NECA has met the burden for allocating more than 5 percent of OB&C expenses to the Common Line Element. NECA's only stated justification for the proposed change in OB&C allocations is a single sentence, in a footnote in its reply, that "[u]pon review of [the *1990 Access Order*], the current Part 36 rules and the pre-1988 procedures in use within the Industry, NECA decided in September 1990 that the user count study methodology fulfills this requirement." NECA Reply at 14 n. 40. There is no explanation of this statement or the rationale used by NECA in reaching that conclusion. Indeed, the balance of NECA's arguments regarding the OB&C allocation issue center on the appropriateness of employing user count methodology for calculating the allocation. We conclude that this statement, by itself, does not provide the type of showing which would be necessary to justify an allocation of OB&C expenses above 5 percent to Common Line.

11. NECA has stated that increased expenses reflected in the 1989 PYCOS, due to the change in OB&C allocations and other factors, led it to revise upward its 1990-1991 growth rate. Since we are rejecting NECA's method of allocating OB&C expenses, we cannot accept the growth rate in costs presented by NECA in this transmittal.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 425 IS REJECTED.

13. IT IS FURTHER ORDERED that National Exchange Carrier Association, Inc., SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on not less than one day's notice.

14. IT IS FURTHER ORDERED that Special Permission No. 91-078 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

15. IT IS FURTHER ORDERED that the petitions against National Exchange Carrier Association, Inc., Tariff No. 5, Transmittal No. 425, filed by American Telephone and Telegraph Company and MCI Telecommunications Corporation, ARE GRANTED to the extent discussed herein, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] National Exchange Carrier Association, Inc., Annual 1990 Access Tariff Filing, Transmittal No. 397, filed Apr. 2, 1990 ("Annual Filing").

[2] *See* Section 36.380(b) of the Commission's Rules, 47 C.F.R. § 36.380(b).

[3] *See* Section 36.380 of the Commission's Rules, 47 C.F.R. § 36.380.

[4] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177, 4216 (Com.Car.Bur. 1990) (*1990 Access Order*).

[5] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for a new FM Station on Channel 250A in Selbyville, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 1991; Released: February 8, 1991

By the Commission:

1. This Memorandum Opinion and Order overturns a Review Board Decision, *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432 (Board Chairman Marino dissenting), which granted the application filed by Galaxy Communications, Inc. for a new FM Station at Selbyville, Delaware, and instead reinstates the ALJ's grant of the application filed by Anchor Broadcasting Limited Partnership. *Anchor Broadcasting Limited Partnership*, 4 FCC Rcd 5687 (ALJ 1989). Now before the Commission are Applications for Review filed May 30, 1990 by Anchor, Selbyville Broadcasting Company (SBC) and Susan M. Bechtel;[1] and a Contingent Application for Review, filed May 31, 1990 by Galaxy.[2] The Applications for Review filed by SBC, [3] Bechtel[4] and the Contingent Application for Review filed by Galaxy will be denied.

2. Anchor is a limited partnership. It claims 100 per cent credit for the integration of its general partner, Dr. Herman Stamps. Stamps and Anchor's three limited partners, Dr. Ridgley C. Bennett, R. Kenneth Mundy and Dr. Francis L. Smith, each own a 25 per cent equity interest in the applicant. The ALJ credited Stamps' integration proposal. 4 FCC Rcd at 5691 ¶¶ 40-41. The Board, however, found that Anchor's limited partners would not be insulated from involvement in the management of the applicant; that there was a variance from the terms of the limited partnership agreement; that other evidence raised questions concerning the reliability of Stamps' pledge to move to Selbyville and be integrated into the mangement of the proposed station; and that no credit was warranted for Anchor's integration proposal. 5 FCC Rcd at 2432-37 ¶¶ 5-27. As set forth below, we find that the Board erred in refusing to credit Anchor's integration proposal, and we grant Anchor's application.

3. *Anchor's Integration*: The Board found that Anchor's limited partners would not be insulated from the conduct of the station's business by its general partner. The Board cited the involvement of Anchor's principals as equal partners in an application for an FM facility in Washington D.C.[5] and it found that the change in the organizational format from a full partnership in the *WOOK* proceeding to a limited partnership in the instant proceeding, was a "paradox" and not "cogently explained." 5 FCC Rcd at 2433 ¶ 9 and 2436 ¶ 23. The Board also cited the friendship between the partners; Stamps' testimony concerning how he would treat the insulation requirements; and testimony from Mundy that he was unaware of any restriction on discussing station business with Stamps. 5 FCC Rcd at 2433-44 ¶¶ 10-12.

4. The ALJ concluded that Anchor's limited partners would be insulated from involvement in the management of the applicant. We agree with that conclusion. The fact that Anchor's principals used a different organization in the WOOK proceeding is not significant. Anchor's principals explained why they adopted the limited partnership arrangement in this case. Stamps testified that he is the general partner because he is retired and has time to manage the station. He further explained that he has acquired a library on broadcasting and visited stations to develop a personal knowledge of broadcasting, whereas the limited partners are actively pursuing their professions, have not developed the same expertise in broadcasting, and do not have the same amount of time to devote to a broadcast station. Stamps also testified that the limited partnership allows Anchor to earn full integration credit, and that because he has authority to manage the applicant, the other principals chose to limit their liability by becoming limited partners. Tr. 160-61. Stamps' testimony was confirmed by Mundy. Mundy testified that Anchor's principals formed a limited partnership because Stamps is retired while he, Bennett and Smith are still fully involved with their professions and that Stamps has a greater interest in ("appetite for") broadcasting. Tr. 270-73.

5. The Board found that Stamps was reluctant to testify concerning how the relationship between the partners would work, and that this raised questions concerning the reliability of Anchor's integration commitment. 5 FCC Rcd at 2433-34 ¶¶ 11-12 and 2437 ¶ 23; Tr. 151-153. However, the Board took Stamps' testimony out of context and it failed to consider that, although Stamps recognized that the relationship between the partners made it difficult to insulate them from the proposed station's business, he will adhere to the insulation requirements. Tr. 150-153. Stamps testified that:

> Q. And you expect to remain friends of the other partners after Anchor is awarded the permit for this station?
>
> A. I hope so.

Q. And you would still expect to be able to talk with them about the business of the station?

A. In the language of the agreement, I understand I am not supposed to accept their consultation or seek it, or anything else that concern (sic) day to day matters of the station. . . .

Q. Well, what is your expectation about how the actual partnership among the partners is going to work?

A. Well, I am afraid to answer that question because I know what is expected of me by law. Now, when you say talk about, well, you know, like somebody might yell down the street or something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this. Right here I am going by this.

Q. But in the real world you expect that you probably will have - -

A. I would not admit that any darn way.

Q. Excuse me?

A. I would never answer you on that one sir. (Tr. 150-151).

* * * *

Q. But you intend to talk to him [Dr. Smith] about the business of the station, don't you?

A. Not according to this, no. This says nor shall [there be] any communication between the general partner or the partnership on matters of day to day operations.

Now, you can talk about the outside of the business but not day to day operations of this or any other media enterprise. I think I understand the restrictions. . . .

Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station . . . ?

A. I don't know which amendment there is about self incrimination, but I certainly wouldn't answer "yes." I would stick to what this says. I always have control of the second side of communication. (Tr. 152-153).

* * * *

A. Well, when I signed . . . this document I signed myself to live under this provision. I don't see a restriction here as awkward as it may apparently be [as] any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them. (Tr. 154-155).

6. The ALJ after listening to this testimony found that Anchor's partners were aware of and would adhere to the insulation requirements of the limited partnership agreement. 4 FCC Rcd at 5688 ¶ 10. The testimony establishes that Stamps was candid and recognized that because of his friendship with the limited partners it would be difficult to adhere to the insulation requirement. However, Stamps testified that in spite of the those difficulties he would adhere to the insulation requirements. Thus, we find that the record as a whole supports a finding that Stamps will adhere to the insulation requirements.

7. It is also clear that the other partners accepted the restrictions imposed on the involvement of limited partners in station affairs. Although Mundy testified that he was unaware of a written prohibition against discussing station matters with Stamps (Tr. 266), he also testified that he will not talk about station business with Stamps and that he will not get involved in the day to day operation of the station. Tr. 269-70. Smith and Bennett testified that they understand the terms of the partnership agreement and will adhere to them. Tr. 298-99 and 314-15. We find that Anchor's limited partners have demonstrated that they understand their obligations and intend to remain insulated from involvement in the management of its proposed station.[6]

8. Galaxy argues that Stamps will not be integrated on a permanent basis. In reply to a question from the ALJ, Stamps testified that he intended to be integrated for the foreseeable future. Tr. 127. Subsequently, Stamps testified that the foreseeable future was two to three years. Tr. 133. Galaxy seizes upon this testimony to argue that Stamps' commitment is too temporary in nature to be credited.

9. We do not agree. It is clear from Stamps' testimony that he did not view the future as capable of being foreseen beyond a period of two to three years, rather than stating an intention that his commitment would expire at the end of that time period. The clear import of Stamps' testimony was that his integration commitment has no fixed duration. Thus, Stamps testified:

A. My expectations are to continue to work the station and develop it.

Q. But you are not necessarily going to be bound to eight hours a day everyday forever, are you?

A. Why not? Within reason. I mean within reason of retirement or sickness, health. Have no reason not to.

Q. When do you think you would be likely to retire from this position?

A. I have no idea.

Q. So it could really happen at any time, couldn't it?

A. You can drop dead in five minutes.

Judge Chachkin: But barring illness or death, do you intend -- it is your intention to remain as general manager for the forseeable future?

A. Yes, sir.

Tr. 126-127. When specifically asked about his commitment to work at the station, Stamps indicated that there was no reason not to expect him to be at the station indefinitely. Thus, the preponderance of the evidence establishes that he does not intend to limit his integration commitment to two to three years.

10. *Local Residence*: Stamps owns residences in Washington, D.C., Ladysmith, Va. and Cape Cod, Mass. and a yacht at Baltimore, Md. Stamps testified that he maintains the residence at Ladysmith as a tax domicile. Finding no intention by Stamps to forsake his Virginia "tax domicile," and citing testimony that Stamps plans to "be pretty much in the capital area" and that he does not want to commute on weekends, the Board refused to credit Stamps' pledge to move to Selbyville. Tr. 71-72; 5 FCC Rcd at 2434-35 ¶¶ 14-25.

11. In direct testimony Stamps clearly and unequivocally stated that he intends to reside in Selbyville. Thus, he testified that:

> I will be the full-time General Manager of Anchor's proposed station . . . I will devote a minimum of forty (40) hours per week, Monday through Friday, and additional time if needed . . . I will reside in Selbyville or within Anchor's proposed city grade contour . . . .

Anchor Ex. 2, pp.2-3.

12. The cross examination cited by the Board was taken out of context and did not undermine Stamps' testimony. Thus, Stamps testified:

> Q. Now I notice in your exhibit . . . you state that you will reside in Selbyville or within the proposed city grade contour, Monday through Friday. . . . *Where do you intend to be on your weekends if not on your boat* ?
>
> A. . . . it is presumptive as to where I would be on Saturday and Sunday. I might be totally in residence in the Selbyville area. I don't know.
>
> Judge Chachkin: Well lets put it more bluntly. Will you maintain a residence *somewhere else beside the Selbyville area* ?
>
> A. I don't know. I have several residences now, and what -- and whether I would confine my living -- I don't see commuting, going up and down the road every weekend, so that I have a place in Virginia, a place in D.C. I have a place in Maryland, and I have a place in Delaware. I think I would probably be pretty much in [the] capital area. I think other areas would be visitation.

Emphasis added. Tr. 71-72. The testimony relied on by the Board related to what Stamps would do on weekends, and does not contradict his testimony that he will reside in Selbyville in connection with his full-time management of the station. Moreover, Stamps testified that he no longer uses his house at Cape Cod or his yacht, and that he will sell the yacht and "get a boat more suitable for the water around Selbyville . . . " (Tr. 74-75) and he reaffirmed his commitment to move to Selbyville. Tr. 140-141.

13. Nor is Stamps' intention to move to Selbyville called into question by the statement that his "principal residence for tax purposes is Virginia." Tr. 72. As the Board noted, Stamps admitted that Ladysmith, Virginia is his *current* domicile, and that for Virginia law he must be there for "six months and a day." Tr. 74. That statement about his domicile was in response to a question concerning whether his *current* principal residence is in Washington, D.C. Nowhere, however, has Stamps indicated any hesitancy about changing that domicile. Thus, while the Board took official notice of the differing tax rates, and Galaxy argued that the differing tax rates are significant, there is nothing in the record that would support a finding that those tax rates are so significant that they would affect Stamps' commitment to move to Selbyville, or that Stamps intends to continue living in Ladysmith for at least six months a year after a license is granted. Any suggestion that Stamps' future residence will be determined by state tax rates is based on speculation in light of the record support for the finding that Stamps will move to Selbyville. *See* 4 FCC Rcd at 5689 ¶ 15.

14. *Variance from the Limited Partnership Agreement*: The terms of Anchor's Limited Partnership Agreement limits the financial responsibility of Anchor's limited partners, and the agreement further provides that it represents the entire agreement between the parties, unless the agreement is subsequently amended by a written agreement. At the time that the applicant certified its financial qualifications, Anchor's principals entered into a separate oral agreement to provide additional funding for financing the construction and operation of its proposed station. Galaxy argues that the agreement for additional financing is inconsistent with the Limited Partnership Agreement, and is evidence that Anchor's principals will be willing to disregard other terms of the agreement, including the provisions insulating the limited partners from involvement in the management of the applicant. The Board said that, although there is an "apparent variance," that variance is entitled "to only slight evidentiary weight as regards Anchor's 'integration' proposal." 5 FCC Rcd at 2435 ¶ 19.

15. The limited partnership agreement strictly limits the liability of Anchor's limited partners to their initial investments of $21,250 per partner. That commitment alone, is insufficient to finance Anchor's proposal. While the limited partners could not be required to increase their contributions to the partnership, nothing in the agreement prevents them from voluntarily increasing their contributions. Thus, the fact that the principals agreed to additional capital contributions for construction and operation of the proposed station, beyond those required by the limited partnership agreement, does not warrant a finding that the partners cannot be relied on to fulfill their partnership obligations. Because of the need for additional funds, the fact that the partners might have entered into an additional agreement without specifically

putting that agreement in writing is not probative of whether Anchor's partners can be relied on to adhere to the terms of the limited partnership agreement.

16. *The Comparative Evaluation*: Galaxy and Anchor are comparatively superior to the other applicants because of their integration proposals. Bechtel does not claim integration credit and SBC has not shown that its principal can be relied on to fulfill her integration commitment. Galaxy and Anchor are each credited with 100 percent integration. Anchor's proposal is preferred because the enhancement for its minority ownership and future residence outweigh the very slight credit awarded Galaxy for local residence and civic activities[8] and for its coverage proposal.[9]

17. ACCORDINGLY IT IS ORDERED, That the Application for Review filed May 30, 1990 by Anchor Broadcasting Limited Partnership IS GRANTED.

18. IT IS FURTHER ORDERED, That the Applications for Review filed May 30, 1990 by Selbyville Broadcasting Company and Susan M. Bechtel, the Contingent Application for Review filed May 31, 1990 by Galaxy Communications, Inc., and the Request for leave to file briefs, filed May 30, 1990 Susan M. Bechtel ARE DENIED.

19. IT IS FURTHER ORDERED, That the Review Board's Decision, 5 FCC Rcd 3432, IS MODIFIED as reflected herein; that the Applications filed by Selbyville Broadcasting Co., Inc. (File No. BPH-860918MB), Galaxy Communications, Inc. (File No. BPH-860918NY) and Susan M. Bechtel (File No. BPH-860918OV) ARE DENIED; and that the Application (File No. BPH-860917MD) filed by Anchor Broadcasting Limited Partnership IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Bechtel requests leave to file a brief pursuant to 47 C.F.R. § 1.115(f). Bechtel has not presented a basis for review and is not entitled to further briefing.

[2] Oppositions were filed June 21, 1990 by Anchor, SBC and Galaxy.

[3] In denying SBC's Application for Review, we need not reach, and thus we are not relying on, the Board's findings with respect to Ms. Capobianchi's family obligations and child care arrangements.

[4] While Bechtel will serve about 7115 (21.33%) more people than Anchor, the entire area is well served by other broadcast media and we agree with the ALJ that Bechtel is entitled to only a very slight preference for her superior coverage. That preference is insufficient to overcome Anchor's preference for integration. 4 FCC Rcd at 5690-91 ¶ 39; 5692 ¶ 47; *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 ¶ 9 (1989); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 647 (Rev. Bd. 1973). Bechtel's remaining argument that the Commission's policy of awarding a preference for integration has been discredited and should not be applied in this proceeding is rejected. The record establishes that Anchor's principal is committed to fulfilling his integration commitment. Thus, Bechtel has not made a sufficient showing to establish that we should disregard the established comparative criteria in this proceeding. In any event, such a change in the comparative criteria would more appropriately be considered in a rule making proceeding.

[5] *United Broadcasting Company (WOOK)*, 100 FCC 2d 1574 (1985). The Board further noted that Anchor's principals withdrew their application in *WOOK*, in consideration of a payment of $1,275,000 and filed the instant application four months later. 5 FCC Rcd at 2433 ¶ 6. They withdrew their application in *WOOK*, however, only after an adverse decision by the Commission and the filing of an appeal. *United Broadcasting Company*, FCC 86I-59, released May 7, 1986.

[6] Recently in *Royce International Broadcasting*, 5 FCC Rcd (1990), we articulated stricter and more comprehensive standards for the crediting of integration proposals. In this case, while the Board refused to credit Anchor's integration proposal, based on our review of the record we find that Anchor's principals were credible and that they explained how they would comply with the policy requiring the insulation of limited partnership interests. This determination is consistent with the *Royce* decision and should not be construed as either weakening or lessening our adherence to those standards.

[7] Although the Board seized upon Stamps' statement that he would have to make a diary of how much time he spends in Ladysmith, that statement was made in the context of testimony that he currently considers his yacht in Baltimore to be a residence, and that he has maintained residences in Cape Cod and Washington, and an admission that he does not know how much time he spends in Ladysmith. Tr. 72-73. Stamps has never retracted his pledge to move to Selbyville, and there is no basis in the record to conclude that his reference to keeping a diary of his time was intended to support a claim of a Virginia domicile *after* Anchor is granted a license.

[8] Galaxy's principal did not move to Selbyville until October, 1987 and his only civic activity of record is membership in the Lion's Club starting in 1988. Thus, Galaxy can only be awarded slight credit for its principal's relatively recent move to Selbyville and his minimal civic activities.

[9] Galaxy will serve about 6,400 more people than Anchor, but the populations to be served receive service from numerous other broadcast services. *See* n.3 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-89

In the Matter of

Imposing Syndicated Exclusivity
Requirements on Satellite Delivery
of Television Broadcast Signals
to Home Satellite Earth Station
Receivers

REPORT AND ORDER
(Proceeding Terminated)

Adopted: December 31, 1990; Released: February 8, 1991

By the Commission:

I. INTRODUCTION

1. In the Satellite Home Viewer Act of 1988 (SHVA),[1] Congress extended to satellite carriers of video programming intended for home viewing an interim compulsory copyright license and clarified the carriers' copyright responsibility for retransmitting television broadcast signals directly to home satellite dish (HSD) owners.[2] Congress took this action to ensure the continued availability of satellite-delivered video broadcast programming to home satellite earth stations in the face of legal doubt about the copyright liability of satellite carriers supplying distant broadcast station signals to HSD owners. Congress also directed the Commission to adopt rules subjecting satellite carriers to syndicated exclusivity similar to the rules governing cable systems if the Commission finds that such rules are feasible.

2. In response, we adopted a Notice of Inquiry and Notice of Proposed Rule Making (NOI/NPRM) on April 12, 1989, [3] requesting comment on whether it is technically and economically feasible to apply some form of syndicated exclusivity requirements to satellite carriers or to other program distributors that sell broadcast programming in the HSD market. We also inquired about the feasibility of alternatives, such as purchase by satellite carriers or satellite program distributors of national or local syndicated program rights.

3. We continue to believe in the necessity and desirability of protecting the exhibition rights of local broadcast stations, but after review of the comments received in this proceeding we conclude that application of exclusivity rules to the nascent HSD industry, which is still relatively small and rural, is infeasible at this time. Equipment to implement exclusivity protection is not currently available, and even if such equipment were developed, manufactured, and placed in service with all possible speed, its distribution in the marketplace would likely be incomplete when the interim compulsory copyright license that is the reason for protection expires at the end of 1994.[4] Accordingly, for the reasons set forth below, we find that currently it is technically infeasible to apply syndicated exclusivity regulation to the distribution of satellite signals to HSD owners, and therefore we decline to promulgate such rules for satellite carriers. Further, even if such rules were technically feasible, we find that economically they would be infeasible.

II. BACKGROUND

4. The SHVA was designed to foster a comprehensive regulatory scheme for programming delivered by satellite carriers to HSD owners. The SHVA seeks to join a statutory copyright compulsory license with Commission syndicated exclusivity regulations. Such a regulatory scheme originated with cable regulation in the 1970's. The Copyright Act of 1976[5] extended copyright protection to television broadcast programs retransmitted for cable viewing.[6] This copyright protection was tempered by freely permitting retransmission of broadcast signals within their coverage area and by allowing cable operators the choice of either purchasing the rights to the programs carried by the distant signals, or paying a statutory copyright royalty fee for a compulsory license to retransmit the programs. The cable compulsory license is explicitly conditioned upon this Commission's cable carriage regulations,[7] which at the time of enactment included syndicated exclusivity provisions adopted in contemplation of the Copyright Act's compulsory license for cable.[8]

5. The issue of satellite carrier copyright liability arose because the Copyright Act exempts retransmissions from copyright liability when made by a passive carrier.[9] Until passage of the SHVA there was uncertainty whether this exception applied to satellite carriers that are not "passive" insofar as they market retransmissions of broadcast signals to HSD owners.[10] Congress desired to ensure the continued availability of such programming to the HSD market.[11] Consequently, in the SHVA, Congress enacted a temporary compulsory copyright license for satellite carriers serving the HSD market.[12] Under the terms of this compulsory license such carriers must pay statutorily prescribed fees through 1992 or until they reach separate agreement on appropriate fees with program copyright owners. The SHVA instructs the Copyright Royalty Tribunal to initiate a process in 1991 designed to result in agreement on fees among the parties by voluntary negotiation or, if necessary, compulsory arbitration, for 1993 and 1994.[13] The compulsory license completely expires at the end of 1994. In this manner Congress sought to encourage the establishment of, and transition to, a marketplace copyright licensing mechanism for satellite carriers.[14]

6. In conjunction with enacting the interim compulsory license for satellite carriers serving the HSD market, Congress also instructed this Commission (1) to determine, with respect to delivery of syndicated programming delivered to HSD owners, whether imposing syndicated exclusivity rules similar to those applicable to cable is feasible; and (2) to adopt such rules if feasible.[15] Such rules would require satellite carriers of terrestrial broadcast signals, upon request from a local broadcaster owning exclusive rights to the program in his service area, to delete duplicative syndicated programs.[16] The legislative history indicates that the purpose of mandating adoption of feasible syndicated exclusivity rules was to establish in the near term "a level playing field between the cable television and earth station industries."[17] The legislative history also indicates that, in determining whether protection is

feasible, the Commission may not conclude protection is infeasible simply because rules would be "incrementally" more costly for satellite carriers than for cable systems.[18]

7. To assist us in determining whether applying syndicated exclusivity regulation to satellite carriers is feasible, we sought comment in the NOI/NPRM on the following issues:

> (1) whether existing technology would permit satellite carriers to selectively delete programming for specific geographic areas in which a broadcaster has asserted exclusivity rights against the carrier;
>
> (2) whether substitution of alternative programming is possible;
>
> (3) whether it is economically feasible for satellite carriers and the HSD industry to implement and comply with such regulation; and
>
> (4) whether there exist feasible alternatives to such regulation.

In addition, the NOI/NPRM asked for comment, in the event HSD syndicated exclusivity rules would be feasible, on the proper coverage and specific requirements of such rules.

III. DISCUSSION

8. Twenty three parties filed comments. Twelve commenters, including the Satellite Broadcasting and Communications Association (SBCA) and General Instrument Corporation (GIC), oppose our adopting syndicated exclusivity rules for satellite carriers. Eleven parties, including the Association of Independent Television Stations (INTV), the National Association of Broadcasters (NAB), and the Motion Picture Association of America (MPAA), filed comments in favor of such rules. INTV, NAB and MPAA also jointly commissioned and submitted a study and response by telecommunications consultants Richard S. Cooperman and Richard S. Gould (Cooperman/Gould Study and Cooperman/Gould Response) that assert the feasibility of implementing syndicated exclusivity using the VideoCipher II encryption technology. Fifteen parties filed reply comments, with 10 expressing opposition to the proposed rules.[19] SBCA, in its reply comments, included a study by consultants G. Gordon Apple and Ron D. Katznelson that finds implementation of syndicated exclusivity not to be technically or economically feasible now or in the foreseeable future.

A. Technological Feasibility

9. *Comments.* In discussing technological feasibility, many commenters discussed concerns related to the capability of General Instrument's VideoCipher II (VC II) and VideoCipher II Plus (VC II Plus) encryption systems to accommodate syndicated exclusivity protection of multiple programs in the more than 200 markets in which the most popular syndicated programs are aired.[20] The Cooperman/Gould Study notes, and opponents concede, that the VC II system currently has deletion capacity only for 32 different markets, and therefore satellite syndicated exclusivity could be implemented immediately only in this limited number of markets.[21]

10. The Cooperman/Gould Study concludes that syndicated exclusivity protection is currently feasible. According to the Study, full protection could be achieved through enhancements to the software and firmware of the VC II Plus system, which at the time comments were filed was believed to be still in development. Comments based upon the Cooperman/Gould Study estimate that modifications to accommodate protection of up to 480 geographic zones would be minor and would require approximately six months to complete, provided that the modifications were introduced during development (rather than after manufacture begins).[22] Based upon this Study, INTV, MPAA and NAB argue that a transition to full syndicated exclusivity protection is feasible in two phases, and propose that the first commence immediately in the 32 markets with the largest concentration of HSDs.[23] They propose that the second phase, to require deletion capability in all markets, commence approximately six months later when they predict that new equipment could be available.[24]

11. Other parties assert that using the currently available technology incorporated in the VC II system to accommodate full syndicated exclusivity protection is not technologically feasible. GIC, the developer and manufacturer of the VC II system, disagrees with the conclusion of the Cooperman/Gould study that modifications would be minor and require only six months to complete. GIC instead asserts that there would be significant degradation to signal acquisition times[25] that would affect all subscribers (not just those within the deletion region) and would be unacceptable to most of them. Even under ideal conditions (complete reception of the transmission on the first try), the acquisition delay would increase from a maximum of 7 seconds to a maximum of 105 seconds if, as proposed by the Cooperman/Gould Study, the current technology were expanded from 32 to as many as 480 geographic areas.[26]

12. GIC, SBCA, and others also state that use of the current technology is infeasible because of the imprecision inherent in a system that relies upon the location of the main post office within each three-digit postal zip code to define the geographic deletion areas. SBCA, for example, argues that the current system's imprecision would deny some HSD owners access to a syndicated program even though they are outside a broadcast station's zone of protection, and permit others within the zone still to receive it. GIC adds that a planned software upgrade to base exclusion zones on five-digit zip codes will refine the system's ability to target HSDs within the zone of syndicated exclusivity protection, but will still result in some subscribers located outside the protected zone having the signal deleted.[27] The Satellite Broadcasting and Communications Association (SBCA), American Home Satellite Association (AHSA) and GIC also note that some consumers may move and not notify the programmer, or may use a mailing address inside a protected zone but actually reside outside the zone.[28] Others, however, note that our cable syndicated exclusivity rules require a cable system to delete programming throughout its service area if any portion of the system is within the protected zone, and therefore some subscribers located more than 35 miles from the television station reference point do not receive the protected programming although they reside outside the protected area.[29] GIC and others respond that it is inappropriate to draw an analogy between zip code areas and cable system service areas, since

zip code areas can include large geographical areas where there is little over-the-air reception, especially sparsely populated areas, and these areas are where the HSD industry provides the most benefits to its subscribers, since over-the-air broadcasting is least available.[30]

13. *Analysis*. We conclude that implementing syndicated exclusivity for HSDs is not technically feasible before the end of 1994, when the interim compulsory copyright license for satellite carriers will expire. All parties agree that equipment capable of deleting programs in more than 32 areas is not currently in place. GIC presents an affidavit disclosing that the just-released improved VideoCipher decoder unit, VC II Plus, has the capability to handle deletions of 56 separate regions instead of the 32 regions of the older unit. But GIC states that both VideoCipher decoders are compatible with the encryption system being used on satellite signals, and therefore there is no plan to require retrofitting of older units (although an upgrade can be voluntarily purchased and installed). Therefore, GIC concludes, any exclusivity requirement to delete more than 32 regions will be ineffective in the relatively near-term because few subscribers will have the new VC II Plus decoders, and even in the long-term only 56 regions could be protected at those homes using the new decoder.

14. Our conclusion that implementing syndicated exclusivity for HSDs is not technically feasible before the end of 1994 is buttressed further by the fact that GIC has shipped 1.4 million VideoCipher units since 1986, but presently there are only 678,000 units being used for authorized reception.[31] SBCA states that while some decoders have been taken out of service, an estimated 500,000 units have been modified to receive encrypted signals without authorization.[32] It is unlikely that these units will be submitted voluntarily to GIC to be updated and to restore the encryption function. It was this problem with piracy, GIC notes, that occasioned the changes that resulted in the new VC II Plus unit.

15. GIC and SBCA present substantial evidence, including a total of three affidavits and the Apple/Katznelson report, that increasing the number of deletion regions would be a complicated and expensive upgrade of the VC II Plus system requiring at least 18 months to accomplish.[33] Even if this reasonable if somewhat ambitious time frame were realized, only the first decoders would be in place in 1992, contemporaneously with negotiations over a copyright fee implementing the second and final phase of the interim licensing scheme. Under any reasonable scenario for introduction of the new decoders, exclusivity protection would not reach a significant level until at least 1994, when the interim copyright license established by the SHVA expires. For instance, assuming that 1) the first units are available in July 1992, 2) decoder sales continue to average 25 to 30 thousand per month,[34] 3) all new decoders sold are used for authorized reception,[35] and 4) none of the approximately 678,000 currently authorized decoders[36] are replaced, the newer units capable of exclusivity protection nationwide would constitute less than 50% of the approximately 2.3 million authorized decoders at the end of 1994.[37] Even assuming that up to 50% of new decoder sales are to replace authorized decoders, it would be approximately July of 1994 before 50% of decoders would have exclusivity protection capability, and only approximately 60% of authorized decoders would have such capability when the compulsory license expires at the end of 1994.[38]

16. Several parties allude to the possibility that the compulsory license might be extended or made permanent, and therefore that exclusivity protection should be implemented with a longer time frame in mind.[39] We, however, must act upon the existing law as enacted by Congress. Based upon a two-phase "transition" to establish the fees to be collected pursuant to the compulsory license, and the specific expiration in 1994 of the license itself, we must assume that Congress does not intend to extend or re-enact this compulsory license. Therefore, in light of the time necessary to design, produce and sell to HSD owners new decoding equipment, including the VC II Plus unit as well as required new firmware and software, we conclude that substantial implementation of full syndicated exclusivity regulation during the limited time of the interim compulsory copyright license is not technically feasible.

17. Having found full implementation technically infeasible during this time frame, we considered mandating a more limited scheme requiring protection of 32 geographic areas for VC II owners and 56 or more areas for VC II Plus owners. We note, however, that rules requiring such limited protection would unfairly discriminate against unprotected stations, would afford only such limited protection that they appear to be economically infeasible, and would be substantially different from the cable syndicated exclusivity rules referred to in the SHVA. Therefore, we believe adoption of such rules is not mandated by the SHVA. *See* para. 21, *infra*.

18. Finally, several parties argue either that this protection is necessary to protect programs in the upcoming DBS (or quasi-DBS) environment, or that imposing the requirements would discourage implementation of DBS.[40] Our decision herein addresses the existing satellite carriers that deliver the signals of superstations and network stations to subscribers using HSDs. This is the system that Congress contemplated when it enacted the satellite carriers' temporary compulsory copyright license and directed us to consider the feasibility of extending syndicated exclusivity protection. As we noted in our recent report on the need for a universal encryption standard,[41] there are reports that new entities will begin offering additional satellite program service directly to homes. In addition to the plans of K Prime Partners and Sky Cable discussed in the encryption standard report, we note that a new entity, SkyPix, is planning to commence service in the summer of 1991.[42] According to media reports, both K Prime Partners and SkyPix are testing retransmissions of broadcast signals and, we believe, plan to use an encryption system that is different from GIC's VideoCipher technology. Although the temporary compulsory license is available to these enterprises, we have no information in the record upon which to base a conclusion on whether it would be technically or economically feasible for them to incorporate the technical means for complying with syndicated exclusivity requirements. In addition, whether any of the proposed systems will be successful in commencing full operations and obtaining sufficient subscribers before the compulsory license expires is unknown. Therefore we do not address the feasibility of adopting exclusivity for these proposed systems, but note that after 1994 they will join the other carriers in being fully liable for the copyrights to retransmitted program material.

B. Economic Feasibility

19. *Comments*. Commenters also addressed the economic considerations that would become relevant if implementation were technically feasible. If it occurred at the same time as the VC II Plus upgrade is designed and released, INTV, MPAA, and NAB, citing the Cooper/Gould Study, argue that implementation would only cost about $1.00 per decoder. However, GIC points out that the VC II Plus was almost finished when the notice in this proceeding was released, and we note that actual distribution of manufactured units commenced in January of 1990.[43] Therefore, GIC argues, it is not possible to link implementation of syndicated exclusivity rules with implementation of the VC II Plus system and save costs. Moreover, INTV, MPAA and NAB's analysis of economic feasibility has assumed that GIC would upgrade all existing VC II units in service to VC II Plus technology. GIC responds that the VC II and VC II Plus units are compatible and therefore that it is not requiring upgrade of all units, although individual consumers can elect to upgrade their decoders by purchasing the new firmware module for $130, not including installation. Were GIC to design an additional upgrade to accommodate 200 or more markets in order to comply with syndicated exclusivity requirements, GIC estimates that to retrofit all VC II units would cost somewhere between $50 and $100 per unit and that the earliest possible availability would be 18 months after initiating the project.

20. Superstar Connection (Superstar) and Southern Satellite Systems Inc. (Southern) focus upon the recurring costs to satellite carriers, and ultimately the HSD owners, of providing syndicated exclusivity protection. They note that satellite carriers, for each channel carried, would have the costly administrative burden of dealing with over 1,100 individual stations in over 200 markets concerning thousands of separate programs, and then applying this information on a subscriber by subscriber basis to initiate program deletion in those markets in which there is a conflict. Superstar compares this complex task with the much simpler task required of cable systems. Cable systems must deal with only a few local broadcasters rather than 1,100 commercial broadcasters nationwide, and must delete programming system-wide, rather than on a subscriber-by-subscriber basis.

21. *Analysis*. Because we already have concluded that syndicated exclusivity rules applied to satellite carriers are technically infeasible in the current environment, we need not reach the issue whether such rules would be feasible from an economic standpoint. Nevertheless, we have analyzed the comments and conclude that for the following reasons the cost for implementing and sustaining syndicated exclusivity for HSD owners would be significantly greater than it is for cable systems. First, equipment capable of performing the deletion and substitution function on cable already has been developed and is in use, whereas no such system has been developed for the HSD industry. Second, in cable's case syndicated exclusivity rules require only the single piece of equipment necessary to accomplish system-wide deletion, whereas, in the case of satellite signals, because of differences in technology, syndicated exclusivity rules would require both system wide and subscriber owned equipment necessary to accomplish deletion on a subscriber-by-subscriber basis. Third, unlike the cable industry, with its large established subscriber base of 53,900,000, the HSD market only has 678,000 subscribers from which to recover costs. Therefore, even if the total developmental costs for implementing exclusivity were equal for cable and satellite, the per-subscriber cost for satellite carriers would be significantly greater. Many of these subscribers live in rural areas and would not be subject to any deletion requirements, yet might have to share in the system's cost.[44] Finally, effective syndicated exclusivity could not begin when modified VC II or VC II Plus units capable of full syndicated exclusivity are first available in the marketplace, but rather, only when a significant number of such new units have been placed in service; the hardware, software, and firmware developed, tested, and implemented; and the logistics of obtaining syndicated information from the broadcast stations established. Based upon these considerations, particularly with respect to the minimal results that could be attained by 1994 when the compulsory license expires, we conclude that the cost of preventing viewing by a relatively few authorized HSD owners for a short period of time is more than incrementally greater than the cost of cable syndicated exclusivity and consequently, that promulgating rules for satellite carriers similar to those for cable is economically infeasible.

C. Other Issues

22. Several parties argue that syndicated exclusivity protection in this area is infeasible because satellite carriers would have a much more difficult and costly task if they were to substitute programming for that which was deleted.[45] Others, however, note the ability of the VC II units to display a message referring subscribers to alternate channels and explaining the deletion, or state that the ability to substitute is irrelevant to the issue under consideration.[46] They find it noteworthy that the permanent compulsory license for cable explicitly extends the compulsory license to programming substituted for duplicative programming deleted to protect exclusivity rights, but that the SHVA provisions before us do not. While we need not reach this issue here, we do believe that it would be significantly more difficult for satellite carriers than for cable because it would require access to another completely separate satellite channel with which to deliver alternative programming to subscribers subject to the deletion.

23. Other parties note that compared to cable, implementing syndicated exclusivity for HSD owners would be ineffective and would fail to prevent wide-scale viewing of the syndicated programs. First, a large number of "pirated" VideoCipher units already are in use that can receive programs without authorization. Second, the technology involved, satellite signal reception, readily permits viewing the same programs when they are transmitted unencrypted on satellite feeds to the stations purchasing them. Schedules of such feeds are widely published in viewing guides marketed specifically to HSD owners.[47] We need not reach this issue here.

24. Lastly, we note that some superstations, such as WTBS, have declared their intention to be "syndex proof" and thereby prevent deletion of their signal on cable systems. In the NOI/NPRM we inquired as to the feasibility of satellite carriers complying with their copyright liability in this manner, rather than through syndicated exclusivity rules. While the superstations and network stations might be able to obtain nationwide distribution rights and thereby eliminate the need for using the compulsory license by both cable operators and satellite car-

riers, it is the stations themselves, and not the satellite carriers, that are able to obtain such rights. This proceeding addresses the rights and liabilities of satellite carriers, not broadcast stations, and thus the WTBS approach is not a viable alternative for satellite carriers. This conclusion does not, however, affect our decision that syndicated exclusivity rules would be infeasible.

IV. CONCLUSION

25. The SHVA has as its principal purpose ensuring the continued availability of satellite-delivered video programming to HSD owners. Congress, also concerned with the copyright questions that raised these issues, enacted a temporary compulsory license and directed specific transitional steps to encourage negotiation among the parties on copyright fees. Although we continue to believe that the cable syndicated exclusivity regulations serve the public interest, application of syndicated exclusivity to the HSD industry is both technically and economically infeasible at this time.[48]

V. ORDERING CLAUSES

26. Accordingly, IT IS HEREBY ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS

1. ABC, CBS and NBC Affiliate Associations (Network Affiliates)
2. American Home Satellite Association (ASHA)
3. Association of Independent Television Stations, Inc. (INTV)
4. Capital Cities/ABC, Inc. (ABC)
5. CBS Inc. (CBS)
6. Corporation for Public Broadcasting (CPB)
7. Eastern Microwave, Inc. (Eastern Microwave)
8. Foundation for Educational Advancement Today (FEAT)
9. General Instrument Corporation (GIC)
10. GE American Communications, Inc. (GE Americom)
11. Hubbard Broadcasting, Inc. (Hubbard)
12. Motion Picture Association of America, Inc. (MPAA)
13. National Association of Broadcasters (NAB)
14. National Basketball Association and National Hockey League (NBA/NHL)
15. National Rural Telecommunications Cooperative (NRTC)
16. NEC Home Electronics (U.S.A.) Inc. (NEC)
17. Netlink USA (Netlink)
18. 97 TV Stations (Stations)
19. Primetime 24 (Primetime)
20. Public Broadcasting Service and National Assoc. of Public TV Stations (PBS/NAPTS)
21. Satellite Broadcasting and Communications Association of America (SBCA)
22. Southern Satellite Systems, Inc. (Southern)
23. Superstar Connection (Superstar)

REPLY COMMENTS

1. Association of Independent Television Stations, Inc. (INTV)
2. Eastern Microwave, Inc. (Eastern Microwave)
3. Foundation for Educational Advancement Today (FEAT)
4. General Instrument Corporation (GIC)
5. Hubbard Broadcasting, Inc (Hubbard)
6. Motion Picture Association of America (MPAA)
7. National Association of Broadcasters (NAB)
8. National Rural Telecommunications Cooperative (NRTC)
9. NEC Home Electronics (U.S.A.) Inc. (NEC)
10. Netlink USA (Netlink)
11. 97 TV Stations (Stations)
12. Primetime 24 (Primetime)
13. Satellite Broadcasting and Communications Association of America (SBCA)
14. Southern Satellite Systems, Inc.
15. Superstar Connection (Superstar)

SUPPLEMENTAL COMMENTS

1. INTV, MPAA & NAB (joint)

FOOTNOTES

[1] Pub. L. No. 100-667, Title II, 102 Stat. 3949-3960 (1988).

[2] This interim license will expire on December 31, 1994.

[3] 4 FCC Rcd 3889.

[4] SHVA, *supra* note 1 at § 202, 102 Stat. 3949.

[5] 17 U.S.C. §§ 101 *et seq.* (1988).

[6] Copyright law did not protect syndicated programs carried by broadcast signals from being retransmitted to other markets before enactment of the Copyright Act of 1976, *see Teleprompter v. Columbia Broadcasting System*, 415 U.S. 394 (1974).

[7] 17 U.S.C. § 111. *See also* 17 U.S.C. § 801 (Copyright Royalty Tribunal authorized to adjust the statutory compulsory license fees to take into account, *inter alia*, changes in FCC carriage regulations).

[8] *See Cable Television*, Report and Order, 36 F.C.C.2d 143 (1972), including the 1971 industry "consensus agreement" set out at 284-287. *See also Geller v. F.C.C.*, 610 F.2d 973 (D.C.Cir. 1979), holding, *inter alia*, that the Commission's promulgation of certain of the cable rules in 1972 was for the purpose of carrying out the industry consensus agreement of 1971 and thereby facilitating passage of related provisions in the Copyright Act. Thus,

in the cable context no less than in the satellite carrier context, the statutory compulsory copyright license and the Commission's syndicated exclusivity rules, fashioned to balance the competing needs and interests of broadcasters and cable operators, are interrelated. We note that although syndicated exclusivity rules for cable were eliminated in 1980, 79 FCC2d 663 (1980), the rules were reimposed with certain modifications in 1990, 3 FCC Rcd 5299, *recon.*, 4 FCC Rcd 2711 (1989).

[9] 17 U.S.C. § 111(a)(3) (1988) provides in pertinent part that there is no copyright infringement if the carrier "has no direct or indirect control . . . over the particular recipients" and its activities "consist solely of providing wires, cables, or other communications channels for the use of others."

[10] In one case decided immediately before passage of the SHVA, a satellite carrier serving the HSD market was held to infringe the applicable copyright laws, *see Pacific & Southern Co. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565 (N.D. Ga. 1988). *See also* Report of the House Committee on Energy and Commerce, H.R. Rep. No. 887, Part 2, 100th Cong., 2d Sess. 12-13 (House Commerce Committee Report) and the Report of the House Committee on the Judiciary, H.R. Rep. No. 887, Part 1, 100th Cong. 2d Sess. 13-14 (1988) (House Judiciary Committee Report).

[11] In 1984 amendments to the Communications Act, Congress adopted provisions to foster a marketing system for retransmissions of broadcast signals to HSD owners. *See* Pub. L. No. 98-549, 98 Stat. 2779, § 5, codified at 47 U.S.C. § 605 (1988).

[12] SVHA at § 202.

[13] A voluntary agreement may become effective before January 1, 1993, if the parties so agree.

[14] House Judiciary Committee Report at 23; House Commerce Committee Report at 15.

[15] The statute also required the Commission to prepare reports on whether an encryption standard for HSD programming should be established and whether satellite carriers unlawfully discriminate in prices charged those who market programming to HSD owners. We have decided not to mandate a national encryption standard. *See* 5 FCC Rcd 2710 (1990). Also, although we found no apparent general pattern of unlawful discrimination by satellite carriers among the various entities operating as distributors to HSD owners of superstation and network station programming, there is a disparity in rates charged to cable system operators and those charged to earth station distributors that was not justified by the limited information in the record on cost factors. We therefore issued a further notice of inquiry to develop a more comprehensive record on this issue. *See* 5 FCC Rcd 523 (1990).

[16] The local broadcaster would be protected from duplicative programs within a 35 mile radius of its location, *see* 47 C.F.R. § 73.658(m)(1) (applicable to cable).

[17] House Judiciary Committee Report at 28.

[18] House Commerce Committee Report at 27.

[19] Appendix A contains a list of those filing formal comments and reply comments, and sets forth the acronyms and abbreviations used for each party.

[20] GE American Communications (GE Americom) states that according to the Nielson Syndication Service, "Wheel of Fortune" was exhibited on 227 stations in the 1988-1989 season, and notes that even the twentieth most popular syndicated program, "Mama's Family," was exhibited by 184 stations. GE Americom also notes that there may be a few markets in which more than one station share syndication rights, implying that the 227 station figure may be slightly higher than the number of individual zones in which deletion would be required. GE Americom Comments at 8. GIC agrees that the most popular syndicated programs "may be sold in up to 200-250 markets or more," and therefore concludes that deletion capability would have to accommodate up to 250 regions. Affidavit of Dr. Jerrold Heller at 2, attached to GIC Comments. The Cooperman/Gould Study, prepared for INTV, MPAA, and NAB, states that in 1988 Arbitron defined 212 major ADI market areas, and that as a general rule a syndicated program will be sold exclusively to only one station in each ADI, and that the station's exclusive zone is limited to within a 35-mile radius of its city of license. Cooperman/Gould Study at 8.

[21] Cooperman/Gould Study at 11.

[22] Cooperman/Gould Study at 11-15.

[23] *See* INTV Comments at 8-9; MPAA Comments at 11; NAB Comments at 16.

[24] *See* Cooperman/Gould Study at 11.

[25] "Signal aquisition time" is the time it takes an HSD receiver to provide a viewable signal after it is tuned to a specific channel. During the time in which the signal is being "acquired," the viewer's television screen is blank.

[26] GIC Reply Comments at 16-20 and attached Affidavit of Dr. Jerrold Heller. *See also* SBCA Reply Comments, Exhibit A (Apple/Katznelson Study) at 7-8. Even using the VC II Plus technology, *see* GIC Reply Comments at 17, n.22, the acquisition time would increase from 3.5 seconds (for 32 markets) to 52.5 seconds (for 480 markets).

[27] GIC Reply Comments at 14-15, n.16.

[28] AHSA Comments at 3; GIC Comments at 5; SBCA at 14. GIC notes that using a different address is not unusual. Canadian subscribers, by using an address in the United States, obtain channels that otherwise would not be available to them. GIC Comments at 5.

[29] *See, e.g.*, INTV Comments at 10.

[30] *See, e.g.*, GE Americom Comments at 9.

[31] *See Satellite Business News*, August 8, 1990, pp. 1, 26. This figure includes authorizations through July, 1990.

[32] SBCA Comments at 7-9.

[33] *See* GIC Comments and Reply Comments; SBCA Reply Comments. GIC submitted an additional affidavit with their reply comments, accompanied by a request that it remain confidential pursuant to the Commission's rules. After INTV *et al.* filed a Freedom of Information Act (FOIA) request for the affidavit, GIC submitted a redacted affidavit without the precise information it wishes to protect, and this copy was served upon INTV *et al.* The outstanding FOIA request will be addressed separately. No party is prejudiced by inaction to date on the FOIA request as the Commission in this proceeding does not disclose or rely on information in the original affidavit. It appears that the principal difference in the original affidavit and the redacted one is that the former states how many "bits" accomplish which task within the VideoCipher architecture. We do not need this information in order to determine the state of technology, as explained in the record by comments and additional information submitted by GIC, SBCA, INTV, NAB, MPAA, and the other parties. INTV, MPAA, and NAB, in joint supplemental comments, also submit an additional study by Cooperman/Gould. This study, based upon information in the redacted affidavit, argues that implementation of a new firmware algorithm would permit application of syndicated exclusivity rules in all markets by using the new VC II Plus decoders. Even if the assertions contained in the report are assumed to be true, however, exclusivity protection likely would not reach a significant level until at least 1994 after time is

allotted for writing, testing, and implementing the necessary software changes and the projected distribution of VC II Plus decoders. *See* paras. 15 and 19, *infra*.

[34] *See* 5 FCC Rcd at 2712, ¶ 23.

[35] This assumption is unreasonable in light of estimated signal "piracy" rates on the order of 50-60%. *See* 5 FCC Rcd 2714, ¶ 39. However, as existing stocks of the compromised VC II decoder are sold, and sales of the as yet uncompromised VC II Plus decoder consequently begin to constitute a greater percentage of total sales, this assumption will become increasingly reasonable. In any event, the effect of any unreasonableness in this assumption would be an underestimation of the time needed to attain a significant level of installed decoders capable of providing exclusivity protection.

[36] *See Satellite Business News*, August 8, 1990, pp. 1, 26. This figure includes authorizations through July of 1990.

[37] The number of authorized decoders not capable of exclusivity protection would increase in the two years from July of 1990 to July of 1992 by 720,000 (24 X 30,000), to 1,398,000. In the two and one half years from July of 1992 to December of 1994, the number of authorized decoders capable of protection would increase from zero to 900,000 (30 X 30,000). Total decoders at the end of 1994 would be 2,298,000.

[38] The total number of authorized decoders would increase between July 1990 and December 1994 by 810,000 (54 X (.5)30,000), to 1,488,000. The number of decoders not capable of exclusivity protection would increase from 360,000 (24 X (.5)30,000), to 1,038,000, by July 1992. After July of 1992 the number of authorized decoders capable of exclusivity protection would increase from zero to 900,000 (30 X 30,000) by December of 1994.

[39] *See, e.g.*, INTV Reply Comments at 13-14.

[40] *See, e.g.*, SBCA Comments at 18; Foundation for Educational Advancement Today (FEAT) Comments and Reply Comments, generally.

[41] 5 FCC Rcd 2710 at 2711 ¶¶ 9-11. *See also* Communications Daily, Nov. 14, 1990 at p.3.

[42] *See* Sateilite News, vol. 13, no. 33 at p. 1 (August 20, 1990); Satellite Week, Dec. 3, 1990 at p. 1.

[43] GIC Reply Comments at 6-10.

[44] A number of commenters noted that most HSD customers live in rural areas where there would be no deletion requirement even if exclusivity rules were adopted. For example, one satellite carrier, Netlink USA, states that it serves 110,000 subscribers (out of 637,000 total HSD subscribers at the time of its comments), of which 80,000 have no access to local television signals. Netlink Comments at 5.

[45] *See, e.g.*, Apple/Katznelson Study at 17; Southern Satellite Systems Comments at 3.

[46] *See, e.g.*, INTV Reply at 13.

[47] *See* SBCA Reply Comments at 13-14, Exhibit A, and Apple/Katznelson Study at 18-19 and Appendix B.

[48] Nothing in this Report and Order precludes voluntary agreements among parties concerning the copyright to the programs at issue, or otherwise affects the provisions of the Copyright Act of 1976 as amended by the SHVA, 17 U.S.C. §§ 101 *et seq*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-032

Application for authority to acquire and operate facilities in the Private Transatlantic Telecommunications Cable System for the provision of authorized common carrier service to the United Kingdom and beyond.

ORDER AND AUTHORIZATION

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1990 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom (U.K.), and points beyond. The application was placed on public notice on November 28, 1990. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign communications services. AT&T currently provides services to the U.K. via various satellites and cables now in existence, and proposes to supplement these facilities by use of the capacity in the PTAT-1 Cable System. AT&T has been authorized to acquire and operate a one-half interest in 51 E-1 circuits[1] in the PTAT-1 cable for service between the U.S. and the U.K.[2] It now proposes to acquire, on and Indefeasible Right of User (IRU) basis, a one-half interest in 21 E-1 circuits in the PTAT-1 cable for service to the U.K. For each of the IRU half-interests, AT&T will pay not more than $720,000 plus annual operations and maintenance charges of approximately $25,000.

3. The Commission stated in its *Private Submarine Cable Decision* [3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] Most recently, on August 22, 1989[5], we granted authority to six common carriers to acquire capacity in the PTAT-1 cable and to use this capacity to provide their authorized common carrier services between the United States and Bermuda, the Republic of Ireland, the U.K., and points beyond. We found that those applicants had provided all the information necessary for grant of the applications.[6] In addition, we found that the circumstances surrounding those applications did not raise an economic impact issue.[7] In the instant application, we find that AT&T's request fits into the same category as the above referenced applications granted on August 22, 1989. AT&T has filed all the information necessary under Section 63.01 of the Commission's Rules. Furthermore, AT&T states that it will be using the capacity in PTAT-1 to supplement existing facilities and the grant of this application will not adversely inpact other common carrier facilities for which AT&T has already been authorized.

4. Upon consideration of the application, we find that authorization of the requested services and facilities are required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-032 IS GRANTED, and AT&T is authorized to:

a. acquire, on an IRU basis, a one-half interest in 21 E-1 circuits in the PTAT-1 cable between the United States and the U.K.;

b. acquire appropriate domestic connecting facilities; and

c. operate such capacity for the provision of AT&T's authorized services between the U.S. and the U.K. and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

[2] *See* AT&T, 4 FCC Rcd 7005 (1989) and 5 FCC Rcd 2593 (1990).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] *See*, CICI, Inc. *et al*, File Nos. I-T-C-89-103 *et al*., 4 FCC Rcd 6622 (1989).

[6] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[7] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-031

Application for authority to acquire and operate facilities for direct service between the U.S. and Hungary.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: January 25, 1991; Released: February 8, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on November 20, 1990 by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and Hungary. The application was placed on public notice on November 28, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Hungary by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-031 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Austria furnished by Austrian PTT;

b. lease from AT&T and operate 24 voice-grade circuits in the Etam, West Virginia earth station;

c. lease from Austrian PTT capacity in an existing coaxial cable between the Austrian earth station and the border of Hungary;

d. lease and operate necessary connecting facilities between US Sprint's technical operating center in New York City and the Etam, West Virginia earth station; and

e. use the facilities in a, b, c and d above to provide US Sprint's regularly authorized services, including switched voice services, between the U.S. and Hungary and beyond;

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in Hungary and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

QUALCOMM, INC. File No. 1132-DSE-MP/L-90
Call Sign E880423

Application for Modification of
Blanket Authority to Construct and
Operation an Additional 20,000
12/14 GHz Transmit/Receive Mobile
and Transportable Earth Stations

ORDER AND AUTHORIZATION

Adopted: January 30, 1991; Released: February 8, 1991

By the Chief, Domestic Facilities Division:

1. Qualcomm, Inc. (Qualcomm) requests authority to modify its authorizations for its OmniTRACS system to allow it to construct and operate an additional 20,000 very small aperture 12/14 GHz mobile and transportable transmit/receive earth stations. Qualcomm's system provides two-way satellite-based data communications between its customers' operation centers and its mobile users by using capacity on GTE Spacenet Corporation's 12/14 GHz GSTAR I satellite. Qualcomm is currently authorized to operate up to 20,600 mobile and transportable units in connection with its system.[1] It now seeks authority to construct and operate 20,000 additional, identical units. No comments or oppositions were filed with respect to Qualcomm's application. For the reasons discussed below, Qualcomm's application for modification is granted.

2. Qualcomm states that as of April 1990, it had delivered more than 7700 OmniTRACS units and had options under scheduled fleet orders that totalled nearly 3000 more. It states that the additional units are needed to allow it to meet anticipated future demand. Qualcomm further alleges that no incidences of harmful interference have been reported in conjunction with the operation of its system. It submits that increasing its authorization to include 20,000 additional units will not affect the technical parameters of the OmniTRACS system and will not increase the chances of harmful interference.

3. Grant of Qualcomm's unopposed application will serve the public interest, convenience and necessity. Authorizing additional units should not increase the potential for harmful interference provided that the units are operated in accordance with the conditions delineated in Qualcomm's initial authorization.[2] Further, grant should allow Qualcomm to meet its projected needs.

4. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Application File No. 1132-DSE-MP/L-90 IS GRANTED and Qualcomm, Inc. IS AUTHORIZED to construct and operate an additional 20,000 temporary-fixed and mobile earth stations in conjunction with its OmniTRACS system, subject to the same terms and conditions of its authorization in File Nos. 869-DSE-P/L-88 and 3073-DSE-ML-88 (Qualcomm, Inc., 4 FCC Rcd 1543 (1989)).

5. Qualcomm, Inc. is afforded thirty days from the date of release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* QUALCOMM, Inc., 4 FCC Rcd 1543 (1989).

[2] *See id.* at para 22.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Eldon L. Hueber d/b/a Cellutech — File No. 60341-CL-P-207-A-86

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A in Market No. 207, Jackson, Michigan MSA

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 1991; Released: February 8, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION AND BACKGROUND

1. Jackson Cellular, Inc. (JCI) was the tentative selectee for the non-wireline authorization for the Jackson, Michigan Metropolitan Statistical Area (Jackson MSA).[1] Subsequently, the Mobile Services Division (Division) dismissed JCI's application, because it did not have reasonable assurance of site availability at the time it filed its application, as required by Section 22.15(a)(1) of the Commission's rules. JCI filed a Petition for Reconsideration of that decision.[2] On June 19, 1990, the Commission issued a Public Notice, Report No. CL-90-226, announcing Cellutech, the third ranked applicant in the lottery, as the new tentative selectee for the non-wireline authorization in the Jackson MSA. On July 20, 1990, Cellutech filed an amendment to its application, pursuant to Section 1.65 of the rules, to change the name of the applicant to Eldon L. Hueber d/b/a Cellutech (Cellutech).[3] Cellutech also filed its financial exhibit pursuant to the requirements of Section 22.917(b) of the rules.

2. On August 6, 1990, JCI filed a Motion for Stay of Proceedings (Motion), requesting that further processing of Cellutech's application be stayed pending final resolution of its Petition for Reconsideration. On August 13, 1990, JCI filed a Petition to Dismiss or Deny (Petition) the captioned Cellutech application. Cellutech opposes the Motion and the Petition.[4]

II. REQUEST FOR STAY

3. *Contentions*. JCI argues that a stay of processing Cellutech's application should be granted because JCI has a substantial likelihood of prevailing on the merits of its Petition for Reconsideration. JCI also claims that it will suffer irreparable harm from the Commission's decision to dismiss its application and process Cellutech's application to grant unless a stay is granted. JCI asserts further that a grant of its motion for stay will not harm Cellutech. Moreover, JCI argues, the public interest will not be harmed by issuing a stay, because non-wireline service has not commenced, and there would be no disruption of the existing wireline service being provided in the Jackson MSA.

4. In its opposition, Cellutech submits that the Commission has previously denied a Motion like JCI's.[5] *U.S. Cellular, Inc.*, 5 FCC Rcd 4577 (Mob. Serv. Div. 1990), and JCI's Motion should be denied pursuant to the holding in that case. *Id.*

5. *Discussion*. To qualify for a stay, JCI must show that (1) it is likely to prevail on the merits; (2) it will be irreparably harmed unless a stay is issued; (3) issuance of the stay will not cause substantial harm to any other party; and (4) the public interest is best served by issuing a stay. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). JCI has failed to show that it will suffer irreparable injury if the application of Cellutech, as amended, is granted. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm."); *see also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). Regulatory relief is available to JCI should it wish to challenge the grant of a construction authorization to Cellutech by filing a petition for reconsideration or an application for review. *Virginia Petroleum Jobbers*, at 925. Indeed, a grant of authorization may be vacated if the decision underlying the grant is reversed as a result of litigation. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, a subsequent construction authorization would be conditioned on the outcome of any pending proceeding regarding the dismissal of prior lottery winners. *U.S. Cellular, Inc., supra*. Therefore, there is no basis for JCI's assertion that the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits.

6. Finally, the grant of a stay would be inimical to the public interest because it would perpetuate the current cellular service monopoly in the Jackson MSA by unnecessarily delaying commencement of service by a competitive, non-wireline carrier. *See BellSouth Mobility, Inc.*, 3 FCC Rcd 6902 (Mob. Serv. Div. 1988). We therefore deny JCI's Motion. *U.S. Cellular, Inc., supra*.

III. PETITION TO DISMISS OR DENY

A. Financial Qualifications

7. *Contentions*. JCI contends that Cellutech is not financially qualified under Section 22.917(b) of the rules.[6] JCI asserts that because the estimated total costs of construction and operation for Cellutech's first year are $1,623,000, the commitment from Motorola totalling $1,430,000, ($1,100,000 in construction plus 30% of that cost for operation), is deficient by $193,000. JCI contends that the financial commitment for $350,000 that Mr. Hueber has obtained from Harris Bank of St. Charles, Illinois (Harris Bank) to compensate for this deficiency is defective because it specifies a loan term of only 90 days. JCI argues that Cellutech will have to consider the Harris Bank loan a current liability on its balance sheet, that Cellutech does not have sufficient net current assets to repay the loan after 90 days, and that there is no indication where Mr. Hueber will obtain the funds for repayment. The loan term of 90 days, says JCI, raises a question as to whether the letter is only an "accommodation" to an existing client, instead of a firm one year commitment.

JCI also claims that the letter does not indicate awareness by Harris Bank of Motorola's first security interest in the cellular system assets. JCI also claims that due to an existing secured obligation of $21,000 that Mr. Hueber has with the Harris Bank, as shown in his financial statement in Cellutech's July 20, 1990 amendment, there is no clear source of collateral for the loan. Moreover, maintains JCI, the loan is a personal commitment to Mr. Hueber, not a commitment to a partnership which Cellutech says it will form in the future, and Harris Bank does not indicate that it would make a loan to such a partnership. For these reasons, JCI argues, Cellutech's application should be dismissed, or designated for hearing on a financial qualification issue.

8. Cellutech responds that it has not borrowed the funds from Harris Bank and therefore the funds are not yet current assets and the loan is not a current liability. Cellutech further responds that the 90 day period for the loan was a term requested by Mr. Hueber to meet his needs rather than a condition imposed by Harris Bank. Cellutech argues that JCI's contentions regarding the short term and repayment of the loan are incorrect, because there is no Commission requirement that an applicant demonstrate an ability to repay the loan for which the commitment is made. Cellutech asserts that JCI's contention regarding Cellutech's failure to demonstrate sufficient net liquid assets is inapplicable because the liquid assets test does not apply to an applicant, such as Cellutech, that is relying entirely on lender financing and not internal assets. Moreover, submits Cellutech, the Harris Bank letter makes the financial commitment for one year, not for the 90 day term of the loan as suggested by JCI. In addition, Cellutech says that the 1% loan fee to be paid by Mr. Hueber shows that the loan is not a mere accommodation by Harris Bank. Furthermore, Cellutech adds, Harris Bank was aware of how the loan monies would be used, relied solely on Mr. Hueber's current assets in committing to make a personal loan, and has knowledge, as indicated by its letter, of the collateral Mr. Hueber will use.

9. *Discussion*. For MSA markets beyond the top 120, Section 22.917(b) of the rules provides that a tentative selectee "shall . . . obtain a firm financial commitment necessary to construct and operate for one year its proposed cellular system . . . ." The rule further states that the amendment which a tentative selectee makes to its application to demonstrate this commitment ". . . shall also include the realistic and prudent costs of proposed construction and other initial expenses; estimated operating expenses for a period of one year; and a balance sheet current within 30 days of the date of filing of the amendment."[8] If the tentative selectee obtains financing from a recognized bank, the Commission further requires that the bank's commitment "evidence the lender's determination that it has assessed the creditworthiness of the loan applicant and that it is committed to providing the necessary financing . . . ." *See* Section 22.917(b)(1)(i) of the Commission's rules.

10. JCI's allegations regarding the inadequacy of a 90 day term for the loan and uncertainty in Mr. Hueber's repayment schedule are without merit. The Commission's policy in establishing a "firm commitment" standard was to require applicants to demonstrate the availability of funding for the proposed systems in order to deter applicants that were not capable of financing cellular proposals from submitting applications for speculative purposes. *Cellular Lottery Reconsideration Order*, 101 FCC 2d 577, 590 (1985). The firm commitment from the lender demonstrates the availability of financing to cover the costs of construction and operation for one year. *Id.* It is this commitment and not a specific period for repayment of the loan that satisfies the rule requirement. JCI's contention as to Mr. Hueber's net liquid assets is immaterial, because Mr. Hueber is not relying on internal financing to show sufficient resources.[9] As shown in its letter, Harris Bank has determined Mr. Hueber's creditworthiness favorably and approved the loan. The letter from Harris Bank indicates that it was aware of Mr. Hueber's sources of collateral for the loan. For these reasons, we reject JCI's allegations that Cellutech is not financially qualified under Section 22.917 of the rules.

B. Compliance with Section 22.13 (a) (1)

11. *Contentions*. JCI argues that Cellutech's application is defective because it fails to comply with Section 22.13(a)(1) of the rules by not identifying the real parties in interest. JCI states that according to Cellutech's July, 1990 Amendment, Cellutech is a prospective partnership which will consist of applicants that were parties to post-filing settlement agreements. JCI asserts that because Cellutech is treating the original settlement agreement as void and is attempting to create another settlement group,[10] Cellutech cannot identify the real parties in interest behind this application. According to JCI, Cellutech is thereby preventing the Commission from determining Cellutech's legal ownership.[11] JCI also asserts that because Cellutech has not accurately disclosed the holdings of Capital Cellular Corp. (Capital), which has acquired the minority interests of some settlement members resulting in an interest totalling at least 6.744%, the Commission cannot determine whether more information is needed regarding Capital's qualifications.

12. JCI asserts that although Cellutech reports in both its application and July, 1990 Amendment that it is a sole proprietorship owned by Eldon L. Hueber, the Amendment shows that a corporate entity is an owner of Cellutech's application. JCI submits that (1) Mr. Hueber's financial statement lists him as president of Cellutech, Inc., which has minority interests in several MSAs; that (2) the Addendum to the post-filing agreement shows that it was entered into by Cellutech, Inc.; and that (3) Mr. Hueber's letter of September 1, 1988, inviting settlement members to sign the Addendum, is from "Eldon Hueber, President of Cellutech, Inc., applicant and third selectee for the Jackson, MI, MSA."[12] JCI concludes that Cellutech has not accurately identified its form of ownership.

13. Cellutech responds that JCI's argument concerning the qualifications of members of the settlement group is irrelevant to processing Cellutech's application because the members are not yet parties to Cellutech's application.[13] Cellutech contends that the proper time for addressing their qualifications will be when it files an application for assignment to the entity which it will form to hold the cellular authorization. Cellutech further asserts that its July 20, 1990 Amendment complies with Commission disclosure requirements by providing the names and addresses of the settlement group, and the settlement documents.

14. Regarding JCI's allegations as to its ownership, Cellutech submits that its July 20, 1990 Amendment shows that it is still a sole proprietorship, as indicated in

the amended FCC Form 401 (Items 10 and 26). Cellutech submits that Cellutech, Inc. is a company wholly owned by Mr. Hueber that holds passive-minority interests in other MSAs. Cellutech adds that when Mr. Hueber offered the Addendum to members of both settlement groups he contemplated a change to corporate ownership, but he has not yet decided on what form of ownership Cellutech will take.

15. *Discussion.* Section 22.13(a)(1) of the rules requires that an applicant disclose fully the real party in interest engaged in the proposed cellular service, including a list of the applicant's subsidiaries, a list of affiliates, and a list of the names, addresses, citizenship, and principal business of any person with an interest of five percent or more in the applicant.[14] Commission policy calls for cellular applicants, except corporate entities, to disclose fully any interest in their applications, even those interests of less than 5 percent.[15] For MSAs 121-305, the Commission required non-wireline applicants to disclose fully the members to pre-filing and post-filing settlement agreements to show compliance with Section 22.13(a)(1), even when those interests were less than 1 percent.[16]

16. We find that Cellutech has complied with the Commission and Bureau guidelines regarding the disclosure of the interests of parties to partial settlement agreements. Cellutech has timely submitted its settlement agreements, including its Addendum Settlement Agreement. Further, it has submitted the identities of the persons and entities who are involved in the Addendum, *i.e.*, those who will receive minority interests when Cellutech forms its new ownership structure. According to the Addendum Settlement Agreement, each separate minority interest will constitute less than one percent.[17]

17. The Commission has established that Section 22.13(a)(1) of the rules does not require submission of information concerning subsidiaries or affiliates other than those which have financial interests in Part 22 licenses, permittees, or applicants, in the same geographical area.[18] The purpose of Section 22.13(a) is "to prevent an applicant from filing numerous applications in the same geographical area under different names." *PMRS, supra*, at n. 7. Therefore, Cellutech is not required to provide information on Capital, which is identified as having a right to a future minority interest, unless Capital were an applicant or owned by individuals or entities that were applicants for the Jackson MSA. A review of MSA 207 applicants does not reveal that Capital was an applicant,[19] nor has JCI alleged that there are ownership interests showing a violation of Section 22.921(b). It is sufficient that Cellutech has disclosed that Capital has a future interest. Therefore, we conclude that JCI's allegations regarding the qualifications of the holders of future ownership interests in Cellutech do not demonstrate that Cellutech is in violation of Section 22.13 (a) of the rules.

18. Finally, while the record shows that Cellutech has not decided upon the ownership structure it will finally use, we cannot find that its current structure is violative of any Commission rules or adversely affects its qualifications to be a cellular licensee. *See Jacksonville Cellular Telephone Corporation*, 2 FCC Rcd 6416, 6418 (Mob. Serv. Div. 1987); *affirmed* 3 FCC Rcd 5386 (1988). We expect that Cellutech will report the details of any subsequent organizational change and seek any necessary authority as required by the rules.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, That the Motion for Stay of Proceedings filed by Jackson Cellular, Inc. IS DENIED.

20. IT IS ORDERED, That the Petition to Dismiss or Deny filed by Jackson Cellular, Inc. IS DENIED.

21. IT IS FURTHER ORDERED That the application of Eldon L Hueber d/b/a Cellutech IS GRANTED, subject to the outcome of any pending proceeding regarding the dismissal of the applications of Jackson Cellular, Inc., File No. 49336-CL-P-207-A-86, and David W. Coffey, File No. 53094-CL-P-207-A-86. Further, Cellutech is on notice that in the event current or future MSA/RSA licensees encounter interference from any service extension Cellutech will have to change frequencies in those cells or reduce its 39 dBu contour to eliminate any interference due to an extension.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] *See Public Notice*, Report No. CL-87-100 (released December 18, 1986).

[2] *See Roberts Cellular, Inc.*, 5 FCC Rcd 1357 (Mob. Serv. Div. 1990), *recon. pending*. The MSD also dismissed the application of David W. Coffey (Coffey), File No. 53094-CL-P-207-A-86, who was the second ranked applicant in the Jackson MSA lottery. *See* Letter to Coffey from Chief, Mobile Services Division (June 7, 1990), *recon. pending*.

[3] The initial application was filed as Cellutech, a sole proprietorship 100% owned by Eldon L. Hueber. The Section 1.65 amendment asserts that the ownership of applicant remains the same as it was when the application was first filed.

[4] In addition, JCI filed a Reply to Cellutech's opposition to the petition. Cellutech filed a Motion to Strike JCI's Reply on the ground that Section 1.823 (b) of the Rules provides that after the petition to deny and opposition reply pleading are filed, additional pleadings will not be accepted. In the instant case, we find that Section 1.823 (b) is applicable and will grant Cellutech's Motion to Strike.

[5] *See Roberts Cellular, Inc., supra*.

[6] Cellutech also contends that JCI does not have standing to file a Petition because the MSD order dismissing JCI's application was effective upon release pursuant to Section 1.102(b) of the rules, so that JCI is no longer an applicant in the Jackson MSA. In referring to *Committee to Save WEAM v. F.C.C.*, 808 F.2d 113 (D.C.Cir. 1986), Cellutech overlooks the Court's statement that the "'effective but not final' procedure did not deprive appellant of the opportunity to challenge the assignment [application], but merely prevented appellant from insisting on the maintenance of the status quo pending review." *Id.* at 119. Moreover, with a pending petition for reconsideration of the MSD's dismissal of its application, JCI is a party in interest in this proceeding. *See* para. 5, *supra*. Therefore, we conclude that JCI has standing.

[7] JCI contends that Cellutech violated the Commission's *ex parte* rules when Cellutech failed to serve JCI with a copy of the Petition to Dismiss or Deny that Cellutech had filed on July 28, 1989 against JCI's application for the Jackson, Michigan MSA prior to the Division's dismissal. We have previously resolved this matter. *See Public Notice*, Report No. CL-90-7 (released October 5, 1989).

[8] 47 C.F.R. §22.917(b).

[9] *See* 47 C.F.R. § 22.917(b)(1)(ii); *American Cellular Corp.*, 103 F.C.C. 26, 44-46 (1986).

[10] After filing its application on April 22, 1986, Cellutech entered into a partial settlement agreement formed by Denman Resources, Inc. (Denman Agreement). *See* July 20, 1990 Amendment. Denman subsequently entered into a Joint Agreement with other parties who had formed similar partial settlement groups or alliances. In its July, 1990 amendment, Cellutech reports that certain conditions subsequent contained in both the Denman Agreement and Joint Agreement failed to occur and caused these agreements to terminate. Cellutech further reports that on September 1, 1988, it offered to members of both the Denman and Joint Agreements a new settlement agreement that it designated Addendum to Denman Agreement and Joint Agreement (Addendum Settlement Agreement).

[11] *See* 47 C.F.R. § 22.4(b).

[12] *See* July 20, 1990 Amendment of Cellutech.

[13] Cellutech asserts in its July 20, 1990 Amendment that there was insufficient time to draft, circulate, and sign a partnership agreement between the release of the Public Notice naming Cellutech as tentative selectee and the date for filing amendments. In its Amendment, Cellutech states that upon receiving an authorization it will form a partnership or some other entity that will include applicants who are included in the Addendum agreement, *see* note 10, *supra*, and also individuals or entities to whom minority interests were assigned. Cellutech says that it has advised settlement members assigning their minority interests that the transfers of those interests will not be recognized by Cellutech until after a grant of Cellutech's application. Cellutech further states that the majority controlling interest will remain with Mr. Hueber.

[14] 47 C.F.R. § 22.13(a)(1).

[15] *See* Public Notice, Report No. CL-86-148A (released May 22, 1986); Public Notice, Report No. CL-86-148, "Procedures Announced for Filing of Settlement Agreements in Cellular Markets 121-305" (released May 12, 1986); Public Notice, Report No. CL-291 (released April 10, 1985). *See also e.g.* Public Notice, Mimeo 366, "Common Bureau Issues Declaratory Ruling Concerning Disclosure of Partnership Interests by Cellular RSA Applicants" (released November 3, 1988).

[16] *Reconsideration of the Cellular Lottery Rule Making*, 58 Rad. Reg. 2d (P&F) 677, 684, and 685 n.29 (1985) (*Reconsideration*). The Commission allowed partial settlement agreements for non-wireline applicants but retained Section 22.921(b) of the rules prohibiting them from having more than 1 percent interest in other applications in the same MSA through such agreements. The Commission initially adopted that rule section for MSAs 91-120. *Cellular Lottery Rule Making*, 98 FCC 2d 175, para. 78 (1984). *See* 47 C.F.R. § 22.921(b).

[17] *See* note 13, *supra*. Cellutech also shows that controlling interest will remain with it after a grant of authorization and the transfer of minority interests.

[18] *Public Notice*, "Real Party in Interest Disclosure Requirements in the Public Mobile Services (PMRS)." Mimeo 1060, released November 26, 1982. *See Cellular One of Terre Haute*, 2 FCC Rcd 4752 (Mob. Serv. Div. 1987).

[19] *See* Lottery Notice for October 27, 1986 Lottery, Mimeo No. 6830 (released September 19, 1986)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-568

In the Matter of

AT&T COMMUNICATIONS

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 28, 1991; Released: February 1, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

I. INTRODUCTION

1. On October 23, 1990, the United States Court of Appeals for the District of Columbia Circuit remanded this proceeding[1] to this Commission. *MCI Telecommunications Corp. v. FCC*, No. 89-1382 (D.C. Cir. Oct. 23, 1990). To assist us in resolving the issues before us on remand, we are now providing an opportunity for parties to comment on the issues specified in Section II, *infra*.

II. ISSUES FOR COMMENT

A. "Likeness" -- Integrated Service Packages and Tariffed Components

2. In the *Tariff 12 Order*,[2] the Commission concluded that the integrated service packages offered by AT&T Communications (AT&T) in its Tariff No. 12 are not "like" their tariffed component services for purposes of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because integrated service packages are not functionally equivalent to the components. In paragraphs 50 through 52 of the *Tariff 12 Order*, the Commission also discussed certain cost and price characteristics of integrated packages which the court held were factors which should have been excluded from the likeness determination. The court ordered this Commission to resolve the likeness issue without regard to these factors. The court expressed no opinion as to the permissibility or validity of the other justifications the Commission gave for its finding on the likeness issue or whether, standing alone, they would be sufficient to support a determination that the services are not "like." To assist us in performing the analysis required by the court, we invite interested parties to address in their comments the following questions:

A.1. Are integrated service packages "like" their tariffed components for purposes of Section 202(a) of the Communications Act? We specifically request interested parties to identify any characteristics and functionalities which distinguish integrated service packages from their tariffed components. Parties should describe such functionalities in detail, with an emphasis on customer perception. [3]

A.2. Are the options before us in this investigation integrated service packages that are "unlike" their tariffed components?

A.3. If integrated service packages are "like" their tariffed components, are any disparities between the prices for the options before us in this investigation and tariffed components unreasonably discriminatory under Section 202(a) of the Communications Act?

B. "Likeness" -- Differences Among Integrated Service Packages

3. In the *Tariff 12 Order*, the Commission briefly addressed the question of whether integrated service packages are "like" each other for purposes of Section 202(a), and concluded that they are "like" to the extent that the functionalities which distinguish integrated service packages from disaggregated tariffed components are intrinsic to all integrated packages. Therefore, customers of any one package receive some network functionalities which are the same as those available in all other packages. The Commission thus required the carriers to ensure that such packages are generally available to similarly situated customers who request substantially similar packages.[4] The Commission also found that differences in the terms and conditions under which customers take integrated service packages can account for differences among customers' bills or differences among packages in pricing and in availability to customers, but would not generally justify characterization of the service obtained by customers as "unlike." However, the Commission did not rule out the possibility that there may be functionalities which might make integrated service packages "unlike" each other. No party challenged this likeness finding, although the appellants did assert that the Commission erred in the remainder of its discrimination analysis. Nevertheless, the court interpreted this analysis as a finding by the Commission that all of the Tariff 12 integrated service packages before the Commission are "like" services with respect to each other and ordered us to address the question of whether any price differences among the integrated service packages before us in this investigation are reasonable. Accordingly, we request comment on the following questions:

B.1. Are the integrated service packages before us in this investigation "like" each other for purposes of Section 202(a) of the Communications Act?

B.2. Parties who argue that these packages are not "like" each other should identify the functionalities and characteristics cognizable under the *Ad Hoc* decision which they claim differentiate these packages from each other, rather than the functionalities that differentiate packages from their component services, with an emphasis on customer perception.

B.3. If the packages are "like" each other, are any price disparities among the integrated service packages before us in this investigation unreasonably discriminatory under Section 202(a) of the Communications Act? We specifically request interested

parties to identify what characteristics or terms and conditions would make any price disparities not unreasonably discriminatory.

C. Remaining Designation Issues

4. In the *Tariff 12 Order*, the Commission found that the integrated service packages before us in this investigation were not "generally available" to all similarly situated customers because of geographic restrictions on their availability. The Commission required AT&T to refile its tariffs without these restrictions or withdraw the offerings. As a result, the Commission did not reach the question of whether they were unlawful on the other grounds designated for investigation. The court held this justification to be inadequate, and ordered us to either reach the issues designated for investigation or provide an adequate explanation for not doing so. Accordingly, we request comment on the following questions:

C.1. Is it necessary or desirable to reach any or all of the issues below, which were designated for investigation in this docket in AT&T Communications, Transmittal Nos. 1018 and 1102, Memorandum Opinion and Order, 3 FCC Rcd 995 (1988), and what is the basis for this conclusion?

C.2. Is AT&T obligated to make reasonable efforts to make the integrated service packages before us in this investigation as generally available as possible and, if so, has AT&T done that?

C.3. Do the integrated service packages before us in this investigation comply with this Commission's Private Line Guidelines?[5]

C.4. Do the integrated service packages before us in this investigation comply with this Commission's policy prohibiting restrictions on resale and shared use?[6]

III. PROCEDURES

5. Pleadings on these issues may be filed on or before March 4, 1991, should reference the docket number for this proceeding, and should be captioned "Comments on AT&T Tariff 12 Issues on Remand." Replies may be filed on or before March 25, 1991, and should be captioned "Reply to Comments on AT&T Tariff 12 Issues on Remand." All submissions must be organized to reflect the issues designated in this Order and must cross-reference by letter and number the issues in Section II, *supra*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The instant docket was initiated as an investigation under Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), of AT&T Transmittal Nos. 1018, 1102, 1145, 1336, 1349, and 1409. The integrated service packages before us in this investigation were denominated in the transmittals as Virtual Telecommunications Network Service (VTNS) Options I, II, III, and IV. Sprint also filed a "Motion for Order to Govern Proceedings on Remand," in which it asked the Commission to expand the scope of its investigation on remand to include all Tariff 12 options on file. We deny Sprint's request to formally include all those options in this investigation. We do so as an exercise of our discretion to organize our proceedings in the most effective way. There are as of today some 77 Tariff 12 options on file at the Commission. To include all the options in this investigation would result in an unwieldy and almost impossible administrative proceeding. To add all the options to the investigation, moreover, would substantially impede our progress toward resolving important questions of lawfulness regarding Tariff 12. We recognize, however, that the other options may raise questions that the first four options raise.

[2] AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989), *rev'd & remanded sub* nom. MCI Telecommunications Corp. v. FCC, No. 89-1382 (D.C. Cir. Oct. 23, 1990).

[3] *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1982) (*Ad Hoc*).

[4] *Tariff 12 Order*, 4 FCC Rcd at 4937, paras. 54-55.

[5] *See* 47 C.F.R. § 61.40; Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

[6] *See, e.g.*, Resale and Shared Use, 83 FCC 2d 167 (1980), *recon. denied*,86 FCC 2d 820 (1981).

SEPARATE STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In Re: AT&T Communications, Revisions to Tariff F.C.C. No. 12 (CC Docket No. 87-568)

I join my fellow Commissioners today in deciding to seek further comment on the questions we must address on remand in the investigation of AT&T's Tariff F.C.C. No. 12.

I think it important to stress, however, that the Commission faces questions about more than just the first four AT&T Tariff 12 options. AT&T's other Tariff 12 options--- some of which are already subject to complaints--- may raise questions of lawfulness as well.

As we go forward, I find myself somewhat concerned that the second major question in this Notice--- whether integrated service packages under Tariff 12 are "like" one another--- is confined to the first four options only. The danger is that in so limiting ourselves, we may not ensure a broad enough record, or find broad enough principles, to help us decide issues beyond the first four options.

The Commission is persuaded that to widen the remand proceeding would create almost insuperable administrative difficulties. I hope, nevertheless, that commenters will keep in mind our need to adduce broad principles that will guide us when we evaluate other Tariff 12 options. For it seems to me beyond question that Tariff 12 customers, companies that compete with AT&T, and the Commission itself will be better off if, at the end of the day, this proceeding makes it possible for us to resolve those Tariff 12 issues that lie beyond the first four options--- whether through complaint proceedings, or by initiating tariff investigations on our own motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2690

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2690 to introduce Virtual Telecommunications Network Service (VTNS) Option 77 by which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for Option 77 are stabilized for a five-year term. *See* AT&T Transmittal No. 2690 Description and Justification (D&J) at 1-4. The basic charge for Option 77 is $285,400 per month. It will be reduced by $10,000 for the first full month of service after the initial service date. *Id.* at 5. Transmittal No. 2690 is scheduled to become effective January 17, 1991.

2. US Sprint Communications Company Limited Partnership (Sprint), MCI Telecommunications Corp. (MCI), Williams Telecommunications Group, Inc. (Williams), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 77 on November 19, 1990. AT&T filed a reply to the petitions against Option 77 on November 30, 1990.

3. Sprint argues that Option 77 is "like" its component services and thus the rate disparities between them are not justified. Sprint also argues that even if Option 77 is not "like" its component services, its rates vary without justification from those of other Tariff 12 options. Sprint Petition at 4-7; *see also* MCI Petition at 2-4. Williams argues that Tariff 12 options are not generally available and that AT&T's cost support is inadequate. Williams Petition at 17-18; *see also* CompTel Petition at 4 n.2, 7-8. Williams also claims that Tariff 12 packages violate the Commission's resale policy and that they unlawfully bundle 800 Service with other services. Williams Petition at 21-22; 24-25.

4. AT&T replies that there is no unreasonable discrimination between the rates in Option 77 and rates in other VTNS options. *Id.* at 11-17. AT&T also asserts that Tariff 12 options are generally available. AT&T asserts that its cost support is not undermined by its reservation of the right to waive a customer's minimum quantity commitments for ports, DTCs, and VTCs, and that, when required by the Commission's rules, such changes would be subject to the Commission's tariff filing and review process. *Id.* at 17-18 & 17 n.**.[1]

5. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2690, the petitions filed by Sprint, MCI, Williams, and CompTel, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

6. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2690 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2690, filed by US Sprint Communications Company Limited Partnership, MCI Telecommunications Corp., Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

8. IT IS FURTHER ORDERED that Transmittal No. 2690 takes effect subject to the outcome of remand proceedings in AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Moreover, AT&T filed a revision to VTNS Section 7.2.9.I stating that any changes in the terms and conditions under which VTNS is provided will be filed in this tariff. *See* AT&T Transmittal No. 2873.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — Transmittal No. 427

Revisions to Tariff F.C.C. No. 5

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. On November 16, 1990, National Exchange Carrier Association, Inc., filed Transmittal No. 427, revising its projected revenue requirements for the Universal Service Fund (USF) and Lifeline Assistance (LA) program for January 1 through June 30, 1991, to $235.9 million and $40.9 million,[1] respectively. Description and Justification (D&J), at 2-3. On December 3, 1990, MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate, and American Telephone and Telegraph Company (AT&T) filed a petition to suspend and investigate. NECA filed its reply on December 13, 1990.

2. In the *Access Tariff Revisions Order*, the Bureau granted NECA permission to implement a portion of the increase.[2] This increase, of $27.6 million for LA and $50.1 million for USF, became effective on January 1, 1991. [3] The remainder of the USF increase (that portion not attributable to the scheduled transition) was deferred until February 1, 1991. Consequently, that portion of the rate increase -- from $0.2696 per month per pre-subscribed line to $0.3090, an increase of $60.0 million on an annual basis -- is still pending. According to NECA this pending increase reflects more current cost data from its members. D&J at 2.

3. AT&T complains that NECA has failed to describe any factors that justify the increase in USF rates. AT&T Petition at 3. AT&T also argues that the NECA data show that a disproportionate percent of the USF expense growth is attributable to growth in corporate overhead, rather than the direct costs of local loop plant. *Id.* at 3-4.

4. MCI states that it has conducted a study of the data NECA used to develop the revised non-transitional USF revenue requirement and believes that NECA has overstated the revenue requirement due to flawed data submitted by the carriers and miscalculations by NECA. More importantly, however, MCI states that the data supplied by the carriers to NECA contain unusually large increases in loop costs without commensurate increases in the number of loops. *Id.* at 5. MCI cites numerous examples of carriers which stated they had significant increases in costs but whose number of loops did not increase significantly. MCI alleges that these statistics show that many carriers are loading more costs into their loop accounts and that NECA is not adequately monitoring the cost reporting by those companies. *Id.* at 5-6. MCI also notes that carriers receiving USF payments have a substantially higher loop unit cost growth than companies which do not receive payments.[4] *Id.* at 7. MCI also questions the accuracy of the data presented by the carriers to NECA by noting the discrepancies between these data and the number of access lines and financial data the LECs reported to the Rural Electrification Administration (REA). *Id.* MCI is concerned that the large increase in loop costs may partially result from abuses of the Commission's Rules by the LECs. *Id.* at 11-12.

5. MCI also complains that NECA has not adequately explained the USF calculations for average schedule companies. *Id.* at 13-14. MCI also contends that the recent Commission audit of the NECA settlement process and Common Line pool raises questions about the accuracy of the NECA data. *Id.* at 15. In light of these concerns, MCI argues that the Commission should conduct a complete evaluation of the high cost fund, including an audit of NECA's procedures. *Id.* at 18.

6. In its reply, NECA argues that the USF is working as anticipated by the Joint Board and the Commission when USF was established, with approximately 84 percent of the monies going to small telephone companies -- those with less than 200,000 USF loops. NECA Reply at 5. NECA argues that the USF was established as an offset to reductions in interstate revenue requirements caused by the transition from subscriber plant factor (SPF) to a 25 percent allocator. According to NECA, while the reduction in SPF reduced the interstate assignment of loop costs $727 million, USF expenses have only reached $620.9 million. *Id.* at 8.

7. NECA also argues that the MCI analysis is inaccurate and the conclusions reached are misleading. One of the major flaws of the MCI analysis, according to NECA, was to compare costs between small and large companies. NECA contends that a more reasonable approach is to compare costs between similar sized companies. It states that, if the comparison is limited to small companies, the difference in increases between USF recipients and non-recipients is comparable. *Id.* at 7. NECA also claims that MCI used erroneous loop cost data in some of its examples and used different data for national average costs per loop than NECA. *Id.* at 13-14. NECA also alleges that MCI did not take into account cases of companies' changes in status from average schedule to cost, or cases involving mergers and acquisitions. NECA claims that most of the companies MCI cites as having the largest increases can be accounted for by those factors. *Id.* at 15-17.

8. NECA also complains that MCI's comparisons to REA data are misleading since the REA loops are not comparable to USF loops. NECA also states that REA has a specific disclaimer that its numbers are not verified. *Id.* at 17-21. NECA also explains the development of its algorithm for average schedule companies and how it verifies the data submitted to it by its members. *Id.* at 25-29.

9. The calculation of USF rates and of the USF payments to individual LECs is based upon actual historical costs. The Common Carrier Bureau has reviewed NECA Transmittal No. 427, the MCI and AT&T petitions, and NECA's reply. We conclude that no compelling argument has been presented that the calculation of those historical costs and of the resulting rates by NECA is so patently

unlawful as to warrant rejection, and no evidence of error sufficient to justify suspension or investigation of the USF rate.

10. At the same time, the goal of universal service is a matter of high priority to this Commission and the Common Carrier Bureau wishes to assure that the USF program is being implemented correctly. This includes assuring that the LECs are accurately reporting their costs to NECA, that NECA is computing accurate USF rates and distributing funds to the LECs, and that the LECs are applying those funds to achieve the goals of the program. To help monitor the implementation of the USF program by NECA and the LECs we accordingly have decided to direct NECA and individual LECs to provide additional information on their calculation of USF costs and rates. We are therefore in the process of preparing an information request that will permit more detailed scrutiny of the USF program, notably of LECs who report unusual increases in loop costs or in the allocation of costs to accounts used to compute USF payments.

11. Accordingly, IT IS ORDERED that the petitions against National Exchange Carrier Association, Inc., Tariff No. 5, Transmittal No. 427, filed by American Telephone and Telegraph Company and MCI Telecommunications Corporation, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] NECA originally projected the LA revenue requirement to be $43.3 million, but subsequently revised it to $40.9 million after removing the revenue requirements associated with the LA programs in New Jersey and Wisconsin.

[2] Local Exchange Carriers' January 1, 1991 Access Tariff Revisions, Order, DA 90-1864, paras. 84 and 89, released Dec. 21, 1990 (Com.Car.Bur.) (*Access Tariff Revisions Order*).

[3] NECA, Tariff F.C.C. No. 5, Transmittal No. 434, filed Dec. 28, 1990.

[4] According to MCI, non-USF recipients have had an average annual growth of loop unit cost of 1.5 percent per year from 1987 to 1989, while USF recipients had a unit cost growth of 4.8 percent per year -- 282 percent higher than non-USF recipients. *Id.* at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Transmittal Nos. 2571, 2719, and 2868

Revisions to Tariff F.C.C. Nos. 1 and 2

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. On September 17, 1990, AT&T Communications (AT&T) filed Transmittal No. 2571 to introduce new provisions to its Multi-Location Calling Plan (MLCP) offering. MLCP is an alternative pricing plan under which the customer pays various monthly charges depending on the number of locations or equivalent locations as specified in its service agreement with AT&T. On October 2, 1990, Mid-Com Consultants, Inc. (Mid-Com) filed a petition to reject Transmittal 2571, to which AT&T replied on October 12, 1990. On November 15, 1990, and on January 28, 1991, AT&T filed Transmittal Nos. 2719 and 2868, respectively, to revise further its MLCP offering.[1] These tariff transmittals are scheduled to become effective on February 2, 1991.

2. AT&T's MLCP offering gives the customer the option of paying one monthly charge per plan in exchange for receiving MEGACOM Service, PRO WATS III, PRO WATS, or WATS (provided under AT&T Tariff F.C.C. No. 2) at all designated locations at rates discounted from those under which these services are normally provided.

3. Presently, if the customer discontinues its MLCP to subscribe to AT&T's Software Defined Network (SDN) Service, no termination liability applies. Under Transmittal 2571, however, a customer who discontinues service prior to the completion of the service period remains responsible for the full monthly plan charge for each month remaining in the service agreement. Also under Transmittal 2571, a customer may avoid termination liability when transferring between service offerings only if it meets certain new conditions: (1) that the same customer subscribe to both AT&T offerings; (2) that the new plan have the same or a greater term commitment and revenue commitment as the commitment remaining in the MLCP being discontinued; and (3) that the same customer have initiated both the old plan and the new plan.

4. On November 15, 1990, AT&T filed Transmittal 2719 to revise Transmittal 2571. Those revisions allow customers who had their MLCPs in effect on September 17, 1990, and are within their initial 12-month service period, to cancel their MLCP during their initial 12-month service period without penalty in order to move their traffic to AT&T's SDN service. On January 28, 1991 AT&T filed Transmittal 2868 to further revise Transmittal 2571. These revisions withdraw two of the new requirements for avoiding termination liability when subscribing to a new service plan: that the same customer subscribe to both plans, and that the same customer initiate both plans. Also, AT&T restructured the original language regarding MLCP customers.

5. In its petition against Transmittal 2571, Mid-Com states that it is a traffic "aggregator" who benefits from AT&T's current tariff provisions. Mid-Com maintains that if the revisions in Transmittal 2571 become effective, then an MLCP customer of AT&T will not be able to switch to a Mid-Com-sponsored AT&T SDN aggregation plan without incurring a penalty in the form of the termination liability. That penalty would negate any benefit derived from the discount, according to Mid-Com, and discriminates unreasonably between customers of AT&T who purchase Mid-Com's services and Mid-Com customers who were not AT&T customers at the outset. Mid-Com Petition at 2-3.

6. The revisions filed under Transmittal 2868 moot mid-Com's contentions. In these circumstances we need not consider AT&T's reply.

7. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2571, 2719 and 2868, the petition filed by Mid-Com, and AT&T's reply.[2] We conclude that no compelling argument has been presented that these tariffs as revised are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

8. Therefore, IT IS ORDERED that the petition to reject or suspend AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal 2571, filed by Mid-Com Consultants, Inc., IS DENIED.

9. IT IS FURTHER ORDERED that the motion to accept a late-filed pleading filed by Mid-Com Consultants, Inc., regarding AT&T Transmittal 2719 IS DENIED and the petition to reject or suspend AT&T Transmittal 2719 filed by Mid-Com Consultants, Inc., IS DISMISSED.

10. IT IS FURTHER ORDERED that AT&T Communications MAY FILE a request to advance the effective date of these transmittals, to become effective on not less than one day's notice. For this purpose Special Permission No. 91-073 is assigned and Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Mid-Com also filed a petition to reject or, in the alternative, to suspend Transmittal 2719. Mid-Com's petition was not timely filed, but was accompanied by a motion to accept the late-filed pleading. Mid-Com failed to demonstrate in this motion good cause for its delay in filing the petition. Therefore, we deny the motion and dismiss its petition against Transmittal 2719.

[2] MCI Telecommunications Corporation (MCI) submitted a letter to the Chief, Common Carrier Bureau, on January 14, 1991, regarding Transmittal 2719. On January 23, 1991, AT&T responded by letter. The issues raised by MCI in its letter are not properly before us and are not considered in this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech	Transmittal Nos. 396, 420,
Operating Companies	480 and 498
Revisions to Tariff F.C.C. No. 2	

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 21, 1989, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 396 to offer a new service -- Signal Transfer Point (STP) Access. The STP is a packet switch providing customers with access to Ameritech's common channel signalling (CCS) network. Ameritech describes STP access as a "dedicated switched access service" connecting customers to its CCS network. Ameritech Description and Justification (D&J) at 1. The CCS network is a packet network physically separate from the public switched network that performs out-of-band signalling and call set-up and provides transmission to local exchange carrier (LEC) databases. Ameritech also filed a petition for waiver of certain sections of Part 69 of the Commission's Rules.[1]

2. The Bureau requested that parties consolidate any petitions against Transmittal 396 and any comments on Ameritech's waiver petition into one pleading to be filed on December 15, 1989.[2] Replies were due on December 26, 1989. Petitions to reject or to suspend and investigate were filed by Ad Hoc Telecommunications Users Committee (Ad Hoc), Allnet Communications Services, Inc. (Allnet), and MCI Telecommunications Corporation (MCI) on December 15, 1989. Metropolitan Fiber Systems, Inc. (MFS) filed its petition to reject or, in the alternative, to suspend and investigate on December 6, 1989. Also, the BellSouth Telephone Companies (BellSouth) and US Sprint Communications Company Limited Partnership (Sprint) filed comments on December 15, 1989. Ameritech filed a reply on December 26, 1989.

3. On October 18, 1990, Ameritech filed Transmittal 480 to offer an out-of-band signalling service. With this transmittal, Ameritech would offer a complete service which presupposes a grant of the waiver it requests for its STP access service. Allnet, MCI, Sprint, CTI Telecommunications, RCI Long Distance, Inc., and the Competitive Telecommunications Association have filed petitions against Transmittal 480 and Ameritech has filed a reply. [3] Finally, Ameritech filed Transmittal 498 on December 13, 1990, which corrects and modifies language contained in Transmittal 480. Allnet has filed a petition to investigate Transmittal 498 and Ameritech has filed a reply. For the reasons stated below, we deny Ameritech's petition for waiver and must therefore reject all of the captioned tariff filings.

II. PLEADINGS

A. The Ameritech Offering[4]

4. There are two components to Ameritech's offering under Transmittal 396: a "port" on the STP, and a dedicated network access line (DNAL) to the port. The "port" is actually the termination in a CCS packet switch for the DNAL and includes the electronics for the DNAL termination comparable to a Special Access channel termination. The DNAL is a 1.544 megabit per second (Mbps) DS1 channel from the customer's premises to the STP. Ameritech would require customers to take both the port and DNAL components of its STP access service. *Id.* at 2.

5. Ameritech claims that STP access will enable interexchange carriers (ICs) to obtain signalling information for calls on the public switched voice and various data networks, faster call set-up and completion, and access to various data bases such as Ameritech's for validating credit card calls. *Id.* at 1. At the time of the filing, Ameritech was not ready to offer CCS services like out-of-band signalling or any of its database services to the public.

6. Ameritech requested a waiver of Part 69 to establish a new rate element for the STP port charge. Each "port" would be dedicated to a subscribing customer. Ameritech would establish a flat monthly charge for the port on the grounds that STP packet switches do not have usage measurement capabilities. *Id.* at 3. Ameritech would charge a special access rate for the DNAL. Ameritech claims "[t]he facilities and equipment components required on the STP Access DNAL are the same as those used in Special Access circuits. . . ." *Id.* at 8-9.

B. Comments

7. Two petitioners argue that the rules governing the provision of CCS services should not be developed in a piecemeal fashion through a series of waiver requests from various carriers, and advocate a Rule Making. Ad Hoc Petition at 5-6; Sprint Petition at 2-3. Ad Hoc also argues that Ameritech has not shown "good cause" for a waiver as required by Section 1.3 of the Commission's Rules. Ad Hoc Petition at 3-5. However, Sprint supports Ameritech's waiver petition because it does not want the availability of CCS services to be delayed pending the result of a Rule Making proceeding. Sprint Petition at 2. BellSouth suggests that Ameritech can rely upon the general waiver of the rule sections applicable to the Local Transport rate element.[5] BellSouth Comments at 1-2.

8. Sprint contends that Ameritech has not provided sufficient detail regarding its cost studies. Sprint Comments at 3-4. Allnet maintains that Ameritech's flat monthly rate would provide an unfair preference to large CCS users and would violate the "equal per unit" requirement of the Modified Final Judgment (MFJ). Allnet Petition at 1-2, *citing* United States v. AT&T, 552 F.Supp. 135, 233-34. MCI contends that Ameritech is currently recovering CCS network investment through Local Transport rates, and that those rates should be lowered to prevent double recovery. MCI Petition at 9-11.

9. MCI argues that Ameritech overstates the interstate portion of CCS costs by developing a percent interstate usage (PIU) factor rather than the separations factor in Part 36 of the Commission's Rules. *Id.* at 13-14. Sprint also criticizes Ameritech's separations factor, claiming that Ameritech has not shown that its separations factor is preferable to a factor based on dial equipment minutes (DEMs) or Subscriber Line Usage. Sprint maintains that a separations factor based on DEMs or Subscriber Line Usage would be approximately 14 percent, while Ameritech's factor would be approximately 27 percent. Sprint Comments at 4-5.

10. MCI criticizes Ameritech for not planning to make Feature Group B signalling available through CCS Access service. MCI Petition at 1-3. MCI accuses Ameritech of planning to establish screening practices at the STP gateway for IC traffic, but not for Ameritech traffic. MCI claims this practice is inconsistent with the Commission's Open Network Architecture (ONA) policies, and argues that ICs should be allowed to connect directly to the LIDB. *Id.* at 3-9. MCI maintains that the calling card verification of Ameritech's LIDB is not a billing and collection function, and should be tariffed. MCI analogizes calling card verification to the Automatic Number Identification (ANI) function of Feature Group D, which is tariffed. *Id.* at 11-13. MFS notes that any customer ordering STP access service is required to pay for a 56 kbps data transmission service. According to MFS, a competitive market exists for data transmission services, and this requirement is anticompetitive and an illegal tying arrangement in violation of antitrust laws. MFS Petition at 1-2. Finally, BellSouth requests that the Bureau leave other LECs free to develop their own CCS rate structures rather than being required to conform to a single rate structure imposed by the Bureau. BellSouth Comments at 2.

C. Reply

11. Ameritech claims that MCI's argument concerning Feature Group B access is premature until Ameritech files a tariff for out-of-band signalling services. Ameritech Reply at 3. Ameritech also asserts that direct connection to the database is not possible for network security reasons *Id.* at 2-3. Ameritech maintains that LIDB credit card validation is a detariffed billing and collection service because it believes LIDB services are not useful unless used in conjunction with Ameritech billing and collection services. *Id.* at 4-5.

12. Ameritech construes the *800 Database Order* [6] to require assignment of STP investment to COE Separations Category 2, and contends that Section 36.124 of the Commission's Rules, 47 C.F.R. § 36.124, requires non-directly assignable Category 2 investment to be separated on a minutes of use (MOU) basis. *Id.* at 4-5. Ameritech asserts that it has provided the same level of cost support that has been adequate in other contexts. *Id.* at 6. Ameritech also maintains that its STP access charge would have a *de minimis* effect on Local Transport rates, so no adjustment is needed to avoid double recovery. *Id.* at 7-8.

13. Ameritech replies that the equal per unit provision applies only to the delivery or receipt of "traffic," which will not be occurring with STP access. According to Ameritech, signalling information is not "traffic" within the meaning of the MFJ, because it is information passing from Ameritech to ICs, not ICs to end users. The term "traffic" is not defined in the MFJ, nor in Section 69.2 of the Commission's Rules. Second, Ameritech claims that the provision only applies to end offices and IC facilities. STP access, Ameritech continues, is neither. Finally, the provision does not apply, Ameritech argues, to Special Access and private line type services. *Id.* at 9.

14. Ameritech maintains that Transmittal 396 is not an illegally tied service because transport from the IC point of presence (POP) to the STP is not a separate service from STP access service. Ameritech also asserts that this arrangement is consistent with its ONA plan. *Id.* at 10-13. Finally, Ameritech argues that it has shown good cause for its waiver request because a separate rate element would enable Ameritech to recover costs from cost-causers. *Id.* at 13-14.

D. Other Filings

15. Ameritech filed Transmittal No. 420 on February 9, 1990, to clarify certain terms in Transmittal 396. MCI asserts that Transmittal 420 does not address any of the problems raised by MCI in its petition against Transmittal 396 and that the terms and definitions in Transmittal 420 are unreasonably vague. Ameritech replies that Transmittal 420 was not intended to address MCI's objections to Transmittal 396, because those objections were addressed in Ameritech's reply to MCI's initial petition. In addition, Ameritech contends that any vagueness in its terms is unavoidable because industry discussions on CCS terminology have not been completed. Ad Hoc filed a letter on February 6, 1990, suggesting that the Commission allow Transmittal 396 to take effect for one year as a temporary experimental tariff. Ameritech responds that Ad Hoc's suggestion would not be appropriate because Transmittal 396 was a "conduit" to CCS-related services. Ameritech seeks to distinguish this from CCS-related services themselves. Letter from M. Pabian, Attorney for Ameritech, to the Chief, Tariff Division, Common Carrier Bureau, February 14, 1990.

III. DISCUSSION

A. Waiver Petition

16. We conclude that Ameritech has not demonstrated that the waiver it seeks is warranted. Courts have observed that

> [a]n applicant for waiver faces a high hurdle even at the starting gate. "When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), quoting *Rio Grande Family Radio Fellowship Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968). Circumstances that would justify grant of a waiver would include "considerations of hardship, equity, or more effective implementation of overall policy. . . ." *Id.* at 1159.

17. Ameritech has made no such showing in this case. Ameritech cites no special circumstances that would prevent it from providing out-of-band signalling as part of a transport offering that complies with existing rules. We note that another carrier has done so.[7] Nor has Ameritech made any showing that application of the existing Part 69 Rules would cause it undue hardship, would be inequitable, or would impair effective implementation of the Commission's overall policy objectives. In short, we find

that Ameritech has failed to demonstrate that the public interest requires grant of its petition for waiver. We therefore deny Ameritech's petition.

B. Tariff Revisions

18. Having concluded that Ameritech has not justified the waiver that it requested to allow it to implement STP Access, we find that the pending tariff revisions are unlawful because they do not comply with Commission Rules and those rules have not been waived. We therefore reject the captioned transmittals as a result of this failure to comply with Part 69 of the Commission's Rules.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that the petition for waiver filed by the Ameritech Operating Companies IS DENIED.

20. IT IS FURTHER ORDERED that the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal Nos. 396, 420, 480, and 498 ARE REJECTED.

21. IT IS FURTHER ORDERED that the petitions to reject or in the alternative to suspend and investigate filed by Ad Hoc Telecommunications Users Committee, Allnet Communications Services, Inc., MCI Telecommunications Corporation, Metropolitan Fiber Systems, Inc., CTI Telecommunications, RCI Long Distance, Inc., and the Competitive Telecommunications Association ARE GRANTED to the extent indicated herein.

22. IT IS FURTHER ORDERED that the Ameritech Operating Companies SHALL ISSUE revisions to their tariff no later than five business days from the release of this Order removing the rejected material and reinstating currently effective material. These revisions shall be scheduled to become effective on not less than one day's notice.

23. IT IS FURTHER ORDERED that Special Permission No. 91-102 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

24. IT IS FURTHER ORDERED that the motion to accept late filed pleading filed by the Ameritech Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Specifically, Ameritech seeks a waiver of Sections 69.4(b), 69.205, and 69.206, and Subparts B, D, and E of Part 69.

[2] *See* Ameritech Operating Companies File Petition for Waiver in Connection with Establishment of New Switched Access Rate Element, Public Notice, DA 89-1557, released Dec. 6, 1989 (Com.Car.Bur.).

[3] Ameritech also filed with its reply a motion to accept late filed pleading, which we grant.

[4] Due to our disposition of the issues raised by the combined pleadings regarding Ameritech's petition for waiver and its STP access tariff, we need not discuss the pleadings relating to Transmittals 480 and 498.

[5] In 1983, the Commission granted a temporary waiver of Sections 69.111 and 69.112 to enable American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) to file access tariffs that complied with the "equal charge per unit of traffic delivered or received" requirement of the Consent Decree ordering the divestiture of the Bell System. This waiver was later extended. *See* American Telephone and Telegraph Co., 94 FCC 2d 545 (1983); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 834, 862 (1984); Memorandum Opinion and Order, FCC 85-87, 50 Fed. Reg. 9633 (1985).

[6] *See* Provision of Access for 800 Service, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989)(*800 Database Order*).

[7] *See* BellSouth Telephone Companies, 5 FCC Rcd 7619 (Com.Car.Bur. 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New England and Telephone Telegraph Company — Transmittal Nos. 1100 and 1104

New York Telephone Company — Transmittal No. 1095

Petition for Waiver and Request for Extension of Time

ORDER

Adopted: January 31, 1991; Released: January 31, 1991

By the Chief, Common Carrier Bureau:

1. On November 30, 1990, the Common Carrier Bureau released an Order[1] directing New York Telephone Company and New England Telephone Company (NYNEX), *inter alia*, to file with the Commission on February 1, 1991, a detailed accounting report with regard to the above-referenced tariffs. Specifically, the Bureau directed NYNEX to: provide a detailed accounting of actual amounts refunded pursuant to the above transmittals; to identify separately the specific amounts actually refunded; and to propose any additional refund mechanisms which may be necessary to achieve compliance with requirements of the *Consent Decree Order*.[2] On January 23, 1991, NYNEX filed a petition for waiver of the Bureau's Order and request for an extension of time until March 1, 1991 to file its report. NYNEX's petition is unopposed.

2. NYNEX states that a portion of the data for December 1990, which is essential for a complete calculation of the amount actually refunded, will not be available until early February, after all the January bills have been rendered. NYNEX asserts that it will then require an additional short period of time to compile the necessary data in order to prepare its report to the Commission. NYNEX further states that the instant request relates only to the date for submission of the report on the refund; NYNEX ratepayers have already received the refund through lower rates. According to NYNEX, it will provide a full accounting of the refund as required by the Bureau's Order.

3. We conclude that good cause has been shown to grant NYNEX's request for waiver of the Bureau's Order and extension of time. Therefore, we grant NYNEX's request to file its report by March 1, 1991.

4. Accordingly, IT IS ORDERED that the petition for waiver and extension of time filed by New York Telephone Company and New England Telephone and Telegraph Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] New England Telephone and Telegraph Co., Transmittal Nos. 1100 and 1104 and New York Telephone Co., Transmittal No. 1095, Order, 5 FCC Rcd 7442 (Com.Car.Bur.1990).

[2] New York Telephone Co. and New England Telephone and Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 5892 (1990), *recon. pending (Consent Decree Order)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for:

Alascom, Inc.
Continental Telephone
Company of Virginia
GTE North Incorporated
GTE South Incorporated
GTE Southwest Incorporated
New England Telephone
and Telegraph Company
Ohio Bell Telephone Company
Pacific Northwest
Bell Telephone Company
South Central Bell
Telephone Company
Southern New England
Telephone Company
The Chesapeake and
Potomac Telephone
Company of Virginia
The Chesapeake and
Potomac Telephone
Company of West Virginia
United Inter-Mountain
Telephone Company

and

Policy Regarding Effective Date
of Depreciation Prescriptions

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 1991; Released: January 31, 1991

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we prescribe depreciation rates and amortizations for thirteen domestic carriers that filed requests in 1990 for changes in their annual depreciation rates. We developed these depreciation rates and amortizations after considering the studies underlying the carriers' requests, staff analysis and recommendations, and the comments ot the interested parties. We also are implementing a change in the Commission's policy regarding the effective date for carriers' depreciation rate changes.

II. BACKGROUND

2. Depreciation is the loss of service value incurred in connection with the use and prospective retirement of telecommunications plant from known causes, the effect of which can be forecast with reasonable accuracy.[1] This Commission is authorized to prescribe depreciation rates which are used to compute the depreciation expense for telephone common carriers as part of our responsibilities under the Communications Act of 1934.[2]

3. The Commission maintains an active role in setting depreciation expense levels because depreciation is an important factor in the determination of a carrier's net investment and the level of earnings that it reports for financial and regulatory purposes. Depreciation is also a significant percentage of all current expenses. In recent years, depreciation expense has become the largest operating expense, amounting to 28% of total operating expenses of the Local Exchange Carriers (LECs) in 1989. Since depreciation rates are based upon estimates, [3] these rates require periodic review to ensure their reasonableness.

4. Under traditional rate-of-return rate base regulation, depreciation is an important factor because depreciation expense is included directly as a part of a carrier's revenue requirement and the accumulated depreciation is a deduction from the rate base. Thus, depreciation directly affects prices charged to telephone ratepayers.

5. Under this Commission's recently adopted Price Cap regulation,[4] increases in depreciation expense do not directly affect the rates charged to customers. However, since depreciation expense affects a carrier's earnings and, under certain circumstances, a carrier's earnings level will be used to determine the amount of sharing of excess earnings with ratepayers[5], the depreciation rates and the resultant expenses still have an important role under Price Cap regulation.

III. REVIEW PROCEDURES

6. It is our practice to review and revise, as necessary, depreciation rates and amortizations once every three years for all major domestic telecommunications carriers. We review depreciation rates for approximately one-third of the larger carriers each year. In determining depreciation rates for prescription, we generally follow the procedures outlined below:

a. A carrier submits a depreciation study to the Common Carrier Bureau. The study consists of a variety of data related to the carrier's recent plant retirements and plans for future plant retirements (i.e., "basic data"), as well as the carrier's assessment of that data in estimating life and salvage parameters.

b. The Bureau independently analyzes the basic data and reviews the carrier's life and salvage estimates.

c. The Bureau prepares its own preliminary recommendations and forwards them to the state commission(s)[6] and the company in a review letter.

d. The company's filings and the preliminary Bureau proposals are discussed at a conference in which representatives of the company, the staffs of the respective state commission(s) and the Bureau participate (i.e., the three-way meeting).

e. The Bureau makes its final recommendations at the close of the three-way meeting.

f. The carrier formally files for revised depreciation rates. These filings may or may not be consistent with the Bureau's recommendations.

g. The Bureau issues a public notice requesting comments on specific changes in depreciation rates.

h. After considering the complete record, the Commission prescribes depreciation rates.

7. This year, in accordance with our triennial schedule, the carriers listed in the caption submitted studies proposing revised depreciation rates and amortizations[7] based upon revised estimates of the primary depreciation factors (*i.e.*, equipment service life, net salvage and mortality dispersion patterns). Following the procedures outlined above, the Bureau proposed rates and amortizations in a *Public Notice* released August 17, 1990.[8] The Bureau transmitted to each carrier and respective state commission a copy of the *Public Notice* and a list of depreciation factors used to calculate its recommended depreciation rates and amortizations. Ameritech, The Bell Atlantic Telephone Companies, BellSouth Corporation, Cincinnati Bell Telephone, GTE Service Corporation, MCI Telecommunications Corporation, the NYNEX Telephone Companies, Pacific Bell, Southwestern Bell Telephone Company, U S West Communications and The New York State Department of Public Service (New York DPS) filed comments. Ameritech, Bell Atlantic, NYNEX, Pacific Bell, Southwestern Bell, U S West, United States Telephone Association (USTA), and the Virginia State Corporation Commission (Virginia Commission) filed reply comments.

IV. DISCUSSION

A. The Depreciation Rate Proposals

8. The rates and amortizations that the Bureau proposed in the *Public Notice* are the same rates and amortizations that the carriers requested in their formal filings. No party filed an objection to these rates and amortizations. We conclude, based upon the record in this proceeding, that the carriers' proposed depreciation rates and amortizations are consistent with the data underlying those rates and with Commission depreciation policy. Accordingly, we prescribe those rates and amounts. We also discuss below other issues raised by the carriers' studies, the public notice, and the commenting parties[9].

B. MCI's Objection To The Commission's Procedures For Prescribing Depreciation Rates and Its Comments On Internally Generated Funds

(1) MCI's Objections

9. MCI requests that the Commission explain the reasons for differences between the depreciation rates that the Bureau proposed in its review letters and the rates set forth in the *Public Notice*. MCI states that there is no public record of the three-way meetings, and that this information is necessary so that interested parties will have a full record with respect to the rates which are proposed for prescription. MCI contends that anything less than the availability of the full record would appear to raise important legal questions under applicable provisions of the Administrative Procedure Act (APA). MCI notes that during 1990 the FCC staff, in its review letters prior to three-way meetings, proposed depreciation expense of $3.5 billion. MCI states that as a result of the meetings, the Bureau recommended a total expense of $3.7 billion without explanation as to what was presented during the meetings and why changes in the initial proposals were made.

10. MCI also argues that carriers' internally generated funds are so large that they do not need increases in depreciation expense this year. MCI contends that over the past three years the Regional Bell Operating Companies (RBOCs) have generated internally nearly $63 billion.[10] It asserts that only $41 billion was used for capital investment during the same period, and thus $22 billion of internally generated funds was not used for capital investment. MCI believes that increases in depreciation expense this year will not go toward investment in improved technology for the benefit of ratepayers. MCI further asserts that, because of the carriers' ease of generating cash, ratepayers need to be assured that their interests are being protected and any increase in prescribed depreciation rates because of shorter useful lives are based on sound, reasonable assumptions.

(2) Responsive Pleadings

11. In their reply comments, the carriers and USTA disagree with MCI's contention that the depreciation review process is procedurally deficient. The carriers contend that MCI has full access to the carriers' initial and updated study filings upon which the FCC and the state commissions based their decisions regarding depreciation rate changes. They contend that, in accordance with the Communications Act, the Commission is obligated to consider state commission views[11] on depreciation and that in using the three-way meeting process the Commission has satisfied this obligation. They further argue that any informal discussions which are internal deliberative processes between the FCC and state commissions are proceedings to which MCI has no right of access. Finally, they contend that the Commission's procedures for prescribing depreciation rate changes meet the notice and comment requirements of the Communications Act and the Administrative Procedure Act, and therefore should not be changed.

(3) Discussion

12. MCI states that the difference between the preliminary depreciation rates proposed in the staff's review letters and the depreciation rates described in the *Public Notice* must be explained on the public record. Anything less, MCI contends, would appear to raise legal questions under "applicable provisions of the Administrative Procedure Act." MCI did not state, however, which provision of the Administrative Procedure Act prohibits our depreciation prescription procedures and we are not aware of any legal barrier to use those procedures. Nothing in the APA requires participation of anyone other than the carriers involved in a depreciation prescription proceeding. *See* 5 U.S.C. § 553(b) (actual notice to persons subject thereto is sufficient for Rule Making of particular applicability). In any event, even assuming general notice to the public of proposed depreciation prescriptions was required under the APA, the issuance of a Public Notice requesting comment on the Bureau's proposal satisfied this requirement. Nothing in the APA provides for public

disclosure and an opportunity to comment on proposals or discussions preliminary to the proposal ultimately noticed for comment, let alone on the Bureau's reasoning for departing from its preliminary recommendations. Moreover, this approach is consistent with our *ex parte* rules which state, "there are no *ex parte* restraints or disclosure requirements in . . . " [a] proceeding conducted pursuant to Section 220(b) of the Communications Act for prescription of common carrier depreciation rates prior to release of a public notice of specific proposed depreciation rates for a carrier or carriers."[12] Given the highly technical nature of the studies and the conclusions to be drawn therefrom, it is not unusual that the staff might change a preliminary recommendation during the review process as a result of further thought or explanation. Further, all studies on which the rates are based are part of the record in this proceeding. As a number of respondents point out, MCI had access to all of the studies and other relevant information, and took advantage of the opportunity to comment. It thus had more of an opportunity to participate than required by the APA, and has no basis for complaint regarding the legality of our procedures.

13. MCI contends that the use of shorter lives for the BOCs contributes directly to an increase in internally generated funds for them. MCI observes that, over the past three years, approximately $22 billion, or 35% of BOC internally generated funds was not used for new capital investment. MCI concedes, however, that there is no requirement that the BOCs reinvest internally generated funds in new equipment. MCI appears to imply that internally generated funds should be considered in setting depreciation rates. Pursuant to Section 32.2000 (g)(2)(ii) of our rules, we prescribe depreciation rates which are designed to depreciate the plant investment, on a straight line basis, over the life of the asset. We consider many factors in estimating plant lives (i.e., technological obsolescence, plant mortality data, effect of wear and tear, inadequacy, public requirements, and carrier replacement plans). MCI has not shown why the way in which carriers use internally generated funds is relevant in determining plant life estimates, and, thus, appropriate depreciation rates. In any event, the useful life periods of which MCI complains are fully supported by the record evidence. As a result, MCI's comments are without merit here.

C. Effective Dates of Depreciation Rate Changes

(1) Background

14. In its comments responsive to our 1989 *Public Notice*,[13] the Virginia Commission staff questioned our current policy of allowing a carrier to select any date within the study year or January 1 of the following year to begin using newly prescribed depreciation rates. The Virginia Commission urged the Commission to implement a policy of applying depreciation rates effective January 1 of the study year. In our *1989 Depreciation Rates Order* [14] we stated that it may be time to reassess our policy in this regard. We directed the staff to review the policy and make recommendations if such a review is warranted. As a result, the *Public Notice* invited comments on whether the Commission should adopt a uniform effective represcription date of January 1 of the study year.

(2) The Pleadings

15. Ameritech, Bell Atlantic, BellSouth, Cincinnati Bell, GTE, NYNEX, Pacific Bell, Southwestern Bell, and U S West favor continuation of the Commission's current policy which allows a carrier to select any date within the study year or January 1 of the following year as the effective date for new depreciation rates. They make four basic arguments. Their principal argument is that the flexibility permitted under the current policy is needed to coordinate the implementation of new depreciation rates with the implementation of new tariffs that reflect the new depreciation rates.[15] Second, they contend that a change in the effective date policy could cause an adverse impact on financial statements. For example, NYNEX states that adopting any uniform effective date would place the financial management side of the capital recovery process in jeopardy and, to the extent depreciation expense is ordered to change before offsetting revenues or reductions in other expenses are obtained, the carrier and its investors may experience capital loss, not recovery. Third, they contend that there is no reason to take away flexibility because depreciation is an endogenous factor under price caps and does not flow through to customers' prices.[16] Fourth, they contend that flexibility could affect state and federal relations. For example, NYNEX contends that the Commission's current policy contributes to coordination between federal and state depreciation and ratemaking matters which helps to maintain harmony between the jurisdictions. NYNEX further states that some states utilize FCC-prescribed depreciation rates for intrastate ratemaking purposes and would want the Commission to continue allowing flexible effective dates so that the Commission's prescription order could be made effective at the same time as it is reflected in a state rate proceeding.

16. In contrast to the comments of the telephone carriers, the New York DPS urges the FCC to adopt a uniform effective date of January 1 of the filing year for prescribed depreciation rates. In support of its position, the New York DPS states that depreciation expense measures the consumption of telephone plant during an accounting period and is a current period cost, and that the use of an effective date later than January 1 of the study year defers the recognition of the changed depreciation expense. This deferral results in the misstatement of both the company's current period depreciation expense and the net value of its plant. It believes that this can lead to an imbalance between the company's book depreciation reserve and its reserve requirement. The New York DPS further contends that depreciation expense should be accorded the same treatment as other current expenses and recorded at the cost actually incurred when it is incurred. In addition, it states that once the proper revised depreciation expense is known, it is inappropriate to continue to book an outdated level of expense. The New York DPS concludes that establishing an effective date of January 1 of the study year signals the industry that depreciation expense is not to be manipulated.

17. Ameritech, Bell Atlantic, NYNEX, Pacific Bell, Southwestern Bell, U S West and USTA filed reply comments in favor of flexibility on effective dates. These reply commenters generally reiterated the view expressed in the comments that flexibility in the effective dates is needed in order to coordinate the implementation of new depreciation rates with changes in their tariffs. Moreover,

Ameritech, Bell Atlantic, NYNEX, Pacific Bell, U S West and USTA in their reply comments disagree with New York DPS's equating depreciation expense with other current expenses and proposing corresponding current expense treatment for depreciation expense. Bell Atlantic and NYNEX contend that the New York DPS is incorrect in assuming that the depreciation prescription is based on information which is particular to January 1 of the study year. U S West states that there is no significant delay between the recognition of the change in depreciation expense by the Commission and its reflection on the carrier's books as asserted by the New York DPS. Nor has any material mismatch between a carrier's book depreciation reserve and its reserve requirement been shown by the New York DPS.

18. In its reply comments, the staff of the Virginia Commission supports a change in the Commission's policy regarding effective dates. It states that when a rate is booked at any time other than the study date, an incorrect rate is being booked. It believes that the current practice fails to accurately match depreciation expense with actual consumption of plant which causes a misrepresentation of the financial condition of the company. It also contends that this policy violates basic accounting principles by allowing an expense to be booked in a future accounting period when it affects a prior one, or to be booked for part of an accounting period, when it affects the entire period.

19. The Virginia Commission states that there is a misconception that capital recovery can only be realized by additional revenues obtained from customer rate increases from depreciation expenses. It suggests that there are alternative sources of capital recovery such as expense reduction and higher sales. Regarding the matching of expense changes and revenue changes, the Virginia Commission agrees with the need for this matching but points out that flexibility does not extend to manipulating reported earnings by either including or excluding revised depreciation expenses. The Virginia Commission discusses the difference between capital recovery and capital consumption, stating that although many use these phrases interchangeably, there are fundamental differences between the two concepts. Accounting for capital consumption requires ensuring that plant be fully depreciated by the time it retires. The recovery of that capital (in actuality, securing sufficient revenues to fund those expenses plus a fair return to investors) is entirely different and unrelated to capital consumption. The Virginia Commission further states that revenues are not generated by consuming plant but rather by selling goods and services and that the goal of depreciation is the measurement of capital consumption, not capital recovery.

(3) Discussion

20. Prior to 1981, it was common practice for carriers to request, and for the Commission to prescribe, January 1 of the study year as the effective date for revised depreciation rates. The Commission did so because the depreciation studies upon which the revised rates were based were made as of that date, and this practice assured that depreciation expense reported for the study year was based on the latest estimate of that expense.

21. In 1981, many carriers began requesting effective dates other than January 1 of the study year. These requests were prompted by changes in depreciation methods that the Commission adopted in 1981.[17] The Commission amended its rules in 1981 to allow the use of the remaining life method of depreciation, which distributes the unrecovered cost of a group of assets over its remaining life expectancy, and to allow the use of the straight line equal life group (SLELG) method of depreciation for new plant additions. Generally, the implementation of these new methods resulted in very large increases in the carriers' depreciation expenses.

22. In requesting effective dates other than January 1, the carriers contended that, because there was controversy among the states concerning the new depreciation methods, they would have difficulty obtaining approval of tariff increases from state commissions until this Commission had actually ordered new depreciation rates. In depreciation prescription orders issued in 1981, after considering the regulatory and financial reporting aspects of effective dates, the Commission determined that during the transition period to the remaining-life and SLELG methods, carriers could select effective dates for new depreciation rates between January 1 of the study year and January 1 of the following year.

23. In response to our request for comments on effective dates in the *Public Notice*, the carriers commenting on this issue unanimously support continuation of the current policy of allowing carriers flexibility in selecting an effective date for new depreciation rates. The two state commissions which commented on this issue argue that the Commission should return to its pre-1981 policy of prescribing January 1 of the study year as the effective date for new rates. After reviewing the comments on this issue, we are not persuaded that it makes sense, in light of new developments since 1981, to continue to allow carriers flexibility in the implementation of new depreciation rates.

24. First, the transition to new depreciation methods that originally gave rise to the current policy of flexibility is completed, and the significant expense increase and controversy related to the introduction of the new methods is no longer a factor. Through the use of the remaining-life and SLELG methods as well as amortizations, the carriers have increased their depreciation accruals to the extent that reserve imbalances have dramatically decreased.

25. Second, the states are not bound by effective dates or depreciation rates prescribed by the Commission. In *Louisiana PSC*,[18] the Supreme Court ruled that the Commission could not preempt the states on depreciation for state ratemaking purposes. Thus, while the carriers must use the effective dates prescribed by the Commission for federal accounting purposes, the states may use their own discretion in determining what effective dates should be used for state ratemaking purposes. Any difference between the dates used for state ratemaking purposes and the dates used for accounting purposes would be accounted for as jurisdictional differences under Part 32.[19]

26. Third, the Commission recently adopted Price Cap regulation for LECs. At this time, all but three of the carriers for which we prescribe depreciation rates will be under price caps for interstate rates. As specified in the Price Cap proceeding, depreciation rate increases will be treated as endogenous. Because of this endogenous treatment of depreciation rates, the direct link between changes in depreciation expense and changes in revenue is broken. Any concern about the coordination of depre-

ciation rate changes based on those rates, at least with respect to federal tariffs, is no longer a factor for consideration for most of the carriers.

27. In addition to these new developments since 1981, we believe there is another compelling reason to reconsider our current policy on flexibility in implementing new depreciation rates. The reason we originally allowed flexibility in selecting effective dates, and the carriers' primary contention as to why that flexibility should continue, is to permit the carriers to match the effective dates for new depreciation rates with the implementation of tariffs based on those depreciation rates. In practice, however, the matching of new depreciation rates with the implementation of new tariffs does not appear to be accurate. One indication of this is that, although individual carriers frequently request a single effective date, the new depreciation expense levels affect both federal and state revenue requirements as well as the revenue requirements of more than one state for multi-state carriers. The tariff changes for these various jurisdictions do not necessarily occur at the same time. All six multi-state carriers reviewed this year requested the same effective date in all states. Therefore, it cannot be that these carriers intend to match individual state tariffs with depreciation changes. We also note that of the twelve triennial carriers mentioned in this Order, seven requested a January 1, 1990 effective date. It is important to note that these seven carriers received increased depreciation expense which was not reflected in their interstate tariffs until July 1, 1990. Therefore, it does not appear that the matching of depreciation changes with tariff changes is a critical factor in the selection of a carrier's effective dates.

28. We acknowledge, as several commenters point out, that depreciation is based on estimates. This does not mean, however, that depreciation expense is a discretionary cost that should be adjusted to reach some desired or predetermined level of earnings. Depreciation occurs each year regardless of a carrier's revenues, and we agree with the New York DPS and the Virginia Commission that the latest depreciation rates are the best measure of depreciation expense. These rates have been established only after a lengthy process that takes into consideration the latest available information about plant lives and salvage values as well as the carrier's future plans for plant retirements and additions.

29. This Commission has historically held that January 1 of the filing year is the preferred effective date for accounting purposes. Even when we modified our policy to allow flexibility for the transition to new depreciation methods, we indicated that immediate recognition was more appropriate for accounting purposes.[20] We modified our policy temporarily only in recognition of the materiality of the changes caused by the new depreciation methods and the fact that carriers could not immediately respond to the changes in their revenue requirements.

30. In view of the fact that the transition to the new depreciation methods is now complete, that states now have latitude in modifying effective dates for their own ratemaking purposes, and that our adoption of Price Caps regulation breaks the direct link between depreciation costs and revenues for interstate ratemaking purposes, we have decided to revert to our earlier policy of prescribing January 1 of the filing year as the effective date for depreciation rates. Inasmuch as this order comes late in the 1990 review cycle, we believe it would be unfair to the carriers to implement this policy in this Order. For the captioned carriers, we therefore adopt the effective dates proposed by the carriers which are shown in the Appendix. Our new policy will be implemented for those carriers studied in the 1991 represcription and thereafter.

D. Amortizations for Dying Accounts

31. Our remaining-life procedures engender a number of technical problems when applied to accounts that are rapidly being phased out (i.e., "dying accounts"). For example, if the final date of termination of service is mis-forecast by as little as a few months, the depreciation rates can change drastically. The most practical way of resolving this problem is to apply an amortization procedure which adjusts the depreciation expense each month to reflect accounting activity.[21] This allows the carriers to reduce the reserve account balance to zero in relatively equal increments.

32. During the 1990 review, the Bureau identified 17 "dying accounts", and concluded after thorough review that the use of an amortization procedure to write off these accounts is consistent with this Commission's policy and practice. No commenting party opposed this proposal for these accounts. We conclude that special amortization procedures should be used for the accounts and amortization periods indicated below:

Carrier and Jurisdiction	Account	Period (months)
GTE-North-Wisconsin	Operator Systems	12
GTE-South-Georgia	Radio	30
GTE-South-South Carolina	Analog ESS	36
	Operator Systems	36
GTE Southwest-New Mexico	Analog ESS	42
New England Telephone-Maine	Step-by-Step	36
	Crossbar	30
-Massachusetts	Step-by-Step	36
	Crossbar	30
-New Hampshire	Step-by-Step	36
	Crossbar	24
-Rhode Island	Step-by-Step	12
	Crossbar	12
-Vermont	Step-by-Step	36
	Crossbar	12
Southern New England Telephone	Step-by-Step	24
	Crossbar	24

33. The special procedure for calculating the amortization for "dying accounts" is as follows:

a. Determine the net service value (*i.e.*, gross, book cost, less book reserve, less the, estimated future net salvage shown in the, Appendix) at the beginning of each month.,

b. Divide the net service value determined in, Step 1 by the number of months remaining in, the amortization period. For example if the, amortization period is 36 months, the first, month's amortization is 1/36 of the net, service value at the beginning of the first, month. The second month's amortization is, 1/35 of the net service value at the beginning, of the second month, and so on.

E. Submission of Whole-Life Depreciation Parameters

34. In many of the depreciation prescription orders that the Commission has approved since its decision in *Property Depreciation*, the Commission has expressed its concern with the size of the depreciation reserve imbalance and the speed with which its actions were resolving the imbalance. Because of the rapid rate of technological advancement in the industry, we continue to believe that the industry's reserve condition is extremely important. As a result, we require carriers in this *Order* to continue to file whole-life rates that are consistent with the prescribed rates until notified to the contrary.

F. Conclusion

35. Having considered the carriers' proposals, and the studies upon which those proposals are based, the views and recommendations of the states, the responses to the *Public Notice*, and the Bureau's studies and analyses, we adopt the depreciation rates, amortization amounts, and effective dates listed in the Appendix.

V. ORDERING CLAUSES

36. ACCORDINGLY IT IS ORDERED, pursuant to Sections 4(i), 201-205 and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 201-205 and 220(b), that the percentages of depreciation and amortization amounts set forth in the Appendix to this Order ARE PRESCRIBED, effective on the dates listed.

37. IT IS FURTHER ORDERED, that the effective date for carriers submitting depreciation studies for review during the 1991 represcription and thereafter will be January 1 of the study year.

38. IT IS FURTHER ORDERED, that this *Order* is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. Section 32.9000.

[2] *See generally* 47 U.S.C. § 220(b) (1982). In recent years, we have also prescribed amortization amounts in lieu of depreciation rates to resolve certain depreciation accounting problems. *See* Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, *Report and Order*, 3 FCC Rcd 984 (1988) (hereinafter, the *Amortization Order)*. An amortization amount is a specific amount to be charged to depreciation expense each year.

[3] Pursuant to our rules, the depreciation rate for an account is a function of life and salvage estimates and the book reserve ratio. *See* 47 C.F.R. Section 32.2000(g)(2)(ii).

[4] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rule Making, 2 FCC Rcd 5208 (1987); Further Notice of Proposed Rule Making, 3 FCC Rcd 3195 (1988); Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989); (recon. pending) Supplemental Notice of Proposed Rule Making, 5 FCC Rcd 2176 (1990); Second Report and Order, 5 FCC Rcd 6786 (1990)(*Second Report and Order)* (recon. pending).

[5] *Second Report and Order*, 5 FCC Rcd at paras. 120-165.

[6] This coordination is conducted pursuant to Section 220(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(i).

[7] The rates proposed herein for United Inter-Mountain's West Virginia operation are initial rates, not revised rates, because, prior to installing a fiber cable from Wytheville, Virginia to Bluefield, West Virginia, earlier this year, United Inter-Mountain had no facilities in West Virginia.

[8] Comments Invited On Depreciation Rate Prescriptions Proposed for Domestic Telephone Carriers And On Commission Policy For Effective Date of Depreciation Prescriptions, 5 FCC Rcd 5257 (1990) (*Public Notice)*.

[9] Ameritech in its comments raised questions about how changes in depreciation expense is treated under the Commission's Price Cap plan. It requested that the Commission treat depreciation rate changes as exogenous changes to the price cap index in order for the LECs to recover those expense changes through rate adjustments. We have already determined that depreciation is endogenous in the Price Cap proceeding. *See Second Report and Order*, 5 FCC Rcd 6786 (1990). Accordingly, we need not address Ameritech's proposal here.

[10] The internally generated funds referred to here consist primarily of depreciation expense, return, and deferred income taxes.

[11] *See* 47 C.F.R. Section 220(i), *supra*.

[12] *See* 47 C.F.R. § 1.1204 (a)(7).

[13] Depreciation Rate Prescriptions Proposed for Domestic Telephone Companies - Pleading Cycle Established, 4 FCC Rcd 6263 (1989).

[14] The Prescription of Revised Percentages of Depreciation pursuant to the Communications Act of 1934, as amended for: GTE Florida Incorporated *et. al.*, 5 FCC Rcd 766 (1990).

[15] *See*, for example, Bell Atlantic's comments at page 2.

[16] *See*, for example, Ameritech's comments at page 3.

[17] Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), 83 FCC 2d 267 (1980) *Property Depreciation, reconsideration*, 87 FCC 2d 916 (1981), *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

[18] Louisiana Public Service Commission v. F.C.C., 476 U.S. 355 (1986) (*Louisiana PSC)*.

[19] *See* 47 C.F.R. Sections 32.1500, 32.4370, and 32.7910.

[20] *See, e.g.*, The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: General Telephone Company of Florida et. al., 88 FCC 2d 1354 (1982).

[21] *See, e.g.*, The Prescription of Revised Percentages of Depreciation pursuant to Section 220(b) of the Communications Act of 1934, as amended, for: American Telephone and Telegraph Company *et al.*, 96 FCC 2d 257 (1983).

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
ALASCOM, INCORPORATED

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 Motor Vehicles	4.9	12	37.3	10.3	-6
2113 Aircraft	6.1	40	19.0	6.7	0
2114 Special Purpose Vehicles	1.0	0	84.2	15.8	0
2115 Garage Work Equipment	3.5	0	45.7	15.5	0
2116 Other Work Equipment	5.7	5	69.3	4.5	10
2121 Buildings	18.5	5	31.4	3.4	1182
2121 Self-Supported Towers	9.6	-25	66.3	6.1	201
2122 Furniture	5.7	10	75.8	2.5	184
2123 Company Comm Equipment	5.2	10	63.8	5.0	14
2123 Office Support Equip	5.5	5	23.6	13.0	0
2124 Gen Purpose Computers	1.6	0	90.2	6.1	0
2212 Autovon Switching	1.7	-5	79.5	15.0	-160
2212 Digital Switching	10.8	0	35.1	6.0	218
2212 Telex Switching	8.3	-5	50.0	6.6	19
2220 Operator Systems	3.3	-5	76.5	8.6	310
2231 Earth Stations	5.0	5	61.5	6.7	-1504
2231 Microwave Radio	4.6	-5	48.3	12.3	0
2231 Non Cellular Radio	8.6	5	48.4	5.4	0
2231 Satellite	1.5	0	83.6	10.9	0
2232 Circuit Analog	4.5	5	48.5	10.3	851
2232 Circuit Digital	8.3	10	27.1	7.6	0
2341 Large PBX	2.5	3	73.5	9.4	59
2351 Public Telephone Equip	5.0	10	39.4	10.1	0
2362 Other Terminal Equip	5.0	0	33.2	13.4	18
2411 Guyed Towers	2.6	-25	89.1	13.8	376
2411 Poles	1.6	-25	113.6	7.1	0
2421 Aerial Cable-Metal	2.9	-5	19.7	29.4	0
2422 Underground Cable-Metal	16.5	-10	0.1	6.7	1
2422 Underground Cable-Non Metal	22.0	-10	8.7	4.6	0
2423 Buried Cable-Coaxial	2.0	-5	40.3	32.4	99
2423 Buried Cable-Metal	12.0	-5	40.3	5.4	27
2423 Buried Cable-Non Metal	16.3	-5	14.0	5.6	0
2424 Submarine Cable-Metal	7.8	-5	-141.2	31.6	-61
2426 Intra-Bldg Cable	10.9	0	59.5	3.7	0
2441 Conduit Systems	32.0	-3	19.8	2.6	1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	3.6	18	48.7	9.3	0
2115 GARAGE WORK EQUIP	10.9	1	20.7	7.2	-51
2116 OTH WORK EQUIP	9.7	5	22.8	7.4	-512
2121 BUILDINGS	30.0	2	21.6	2.5	-197
2122 FURNITURE	9.0	7	14.6	8.7	-36
2123 OFFICE EQUIP-CO COMM EQUIP	7.1	8	38.9	7.5	-168
2123 OFFICE SUPPORT EQUIP	6.0	12	7.7	13.4	-25
2124 COMPUTERS	3.6	7	50.1	11.9	0
2211 ANALOG ELEC SW	6.5	2	45.7	8.0	9022
2211 CUST. PREMIS	2.2	0	73.4	12.1	0
2212 DIGITAL ELECT	12.2	1	17.3	6.7	553
2215 ELECTRO-MECH SXS	1.1	-6	53.4	47.8	0
2215 ELECTRO-MECH XBAR	0.5	-6	106.0	0.0	0
2220 OPERATOR SYSTEMS-XBAR/ANALOG	2.1	0	57.6	20.2	58
2220 OPERATOR SYSTEMS-EMS DIGITAL	15.0	0	0.0	6.7	0
2231 RADIO SYSTEMS	8.4	-3	28.6	8.9	-82
2232 CIRCUIT ANALOG	5.0	-1	44.6	11.3	3672
2232 CIRCUIT DIGITAL	6.7	0	25.9	11.1	556
2232 CIRCUIT EQPT DDS	7.8	-4	24.5	10.2	-30
2351 PUBLIC TELEPHONE	7.6	10	54.2	4.7	714
2362 OTH TERM EQUIP	5.4	1	68.0	5.7	-404
2362 OTHER TERMINAL EQUIP	8.4	18	63.6	2.2	0
2411 POLES	16.9	-43	32.2	6.6	-1253
2421 AERIAL CABLE	13.7	-17	36.9	5.8	4677
2422 UNDRGRND CABLE	18.4	-12	35.7	4.1	6641
2423 BURIED CABLE	13.5	-5	32.1	5.4	7684
2424 SUBMARINE CABLE	11.7	-8	54.1	4.6	2
2426 INTRABLDG NTWK CABLE	14.1	-20	50.3	4.9	1374
2441 CONDUIT SYSTEMS	43.0	0	18.9	1.9	1776

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, and as amended by Erratum DA 88-202, released February 19, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	3.4	14	51.5	10.1	0
2115	GARAGE WORK EQPT	9.7	6	30.4	6.6	-3
2116	OTHER WORK EQPT	9.5	6	23.6	7.4	-27
2121	BUILDINGS	28.0	4	23.7	2.6	-210
2122	FURNITURE	9.2	3	34.3	6.8	43
2123	OFC EQPT-CO COMM EQ	6.1	8	35.5	9.3	2
2123	OFC EQPT-OFC SUP EQ	5.7	5	21.5	12.9	26
2124	COMPUTERS	3.1	5	57.6	12.1	0
2211	ANALOG SWITCHING	3.4	10	37.1	15.6	2112
2212	DIGITAL SWITCHING	12.2	5	15.9	6.5	48
2215	EMECH SWITCHING-SXS	0.8	-3	103.0	0.0	0
2215	EMECH SWITCHING-XBAR	0.9	-2	88.2	15.3	0
2220	OPER SYS-DIGITAL	9.9	5	18.2	7.8	0
2220	OPER SYS-XBAR/ANALOG	2.4	0	88.2	4.9	42
2231	RADIO SYSTEMS	7.0	3	39.2	8.3	-161
2232	CIRCUIT EQPT-ANALOG	4.8	0	27.5	15.1	1245
2232	CIRCUIT EQPT-DIG CIR	6.8	1	37.0	9.1	2752
2232	CIRCUIT EQPT-DIG SYS	4.0	1	22.5	19.1	-3
2351	PUBLIC TELEPHONE	7.8	4	42.1	6.9	-5
2362	OTH TER EQ-TEL & MIS	6.7	4	59.1	5.5	-127
2362	OTH TERM EQ-OTH TERM	9.1	11	42.7	5.1	-1
2411	POLES	16.0	-40	39.1	6.3	304
2421	AERIAL CABLE	15.1	-21	40.8	5.3	7183
2422	UNDERGROUND CABLE	18.2	-17	32.6	4.6	1066
2423	BURIED CABLE	10.8	-7	48.6	5.4	5458
2424	SUBMARINE CABLE	7.1	0	50.5	7.0	-7
2426	INTRABLDG CABLE	9.9	-21	45.6	7.6	394
2441	CONDUIT SYSTEMS	37.0	-8	20.6	2.4	468

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
CONTINENTAL TELEPHONE COMPANY OF VIRGINIA

Effective January 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	4.9	20	17.4	12.8	0
2116	OTH WORK EQPT	13.8	0	25.0	5.4	-83
2121	BUILDINGS	31.0	10	19.6	2.3	-132
2122	FURNITURE	17.6	11	22.7	3.8	-31
2123	OFFICE EQUIPMENT	7.2	0	41.9	8.1	-12
2124	GEN PURPOSE COMP	3.7	5	51.3	11.8	0
2212	DIGITAL SWITCHING	11.2	2	24.3	6.6	-551
2215	SXS SWITCHING	1.1	0	93.8	5.6	-13
2220	OPERATOR SYSTEM	9.4	0	13.1	9.2	0
2231	RADIO-MICROWAVE	10.3	0	39.1	5.9	4
2232	CIRCUIT EQPT	5.8	5	43.5	8.9	282
2351	PUBLIC TELEPHONE	6.8	0	48.5	7.6	-9
2362	OTH TERM EQPT	6.2	0	58.2	6.7	0
2411	POLE LINES	14.1	-55	57.3	6.9	97
2421	AERIAL CABLE	14.5	-10	34.9	5.2	-63
2422	UNDERGROUND CABLE	18.7	0	29.3	3.8	94
2423	BURIED CABLE	15.6	0	25.3	4.8	1641
2424	SUBMARINE CABLE	12.2	0	58.2	3.4	-9
2431	AERIAL WIRE	—	-92	107.3	5.0	0
2441	CONDUIT SYSTEM	34.0	0	26.3	2.2	3

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - IOWA

Effective January 1, 1991

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112 MOTOR VEHICLES	4.5	15	63.3	4.8	0
2113 AIRCRAFT (1)	---	40	60.0	8.0	0
2115 GARAGE WORK EQ	12.3	0	5.0	7.7	0
2116 OTHER WORK EQUIPMENT	9.0	14	41.9	4.9	0
2121 BUILDINGS	20.0	5	32.9	3.1	0
2122 FURNITURE	13.5	5	49.6	3.4	0
2123 CO COMMUNICATION EQUIP	9.3	1	55.4	4.7	0
2123 OFFICE EQUIPMENT	9.9	1	79.9	1.9	0
2124 GEN'L PURPOSE COMPUTERS	4.4	5	30.2	14.7	0
2211 ANALOG ELEC SWITCHING	7.5	0	77.2	3.0	0
2212 DIGITAL ELEC SWITCHING	13.2	3	16.9	6.1	0
2215 ELECTROMECH RECORDING	2.6	0	61.0	15.0	0
2215 ELECTROMECH SWITCHING	3.5	2	72.9	7.2	0
2231 RADIO SYSTEMS	3.4	0	15.5	24.9	0
2232 CIRCUIT EQUIPMENT	6.4	5	29.9	10.2	0
2362 OTHER TERMINAL EQUIP	4.8	1	57.8	8.6	0
2411 POLES	12.1	-40	16.2	10.2	0
2421 AERIAL CABLE-METALLIC	11.8	-20	20.2	8.5	0
2421 AERIAL CABLE-NONMETAL	18.7	-10	8.7	5.4	0
2422 UNDGROUND CABLE-NON MET	23.0	-7	7.6	4.3	0
2422 UNDERGROUND CABLE-METAL	16.2	-13	20.2	5.7	0
2423 BURIED CABLE-METALLIC	13.9	-5	35.9	5.0	0
2423 BURIED CABLE-NON METAL	23.0	-5	7.5	4.2	0
2426 INTRABLDG NETWORK CABLE	---	-15	115.0	5.0	18
2431 AERIAL WIRE	4.6	-92	142.2	10.8	0
2441 CONDUIT SYSTEMS	38.0	-3	30.9	1.9	0

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve.

(1) This rate is not based upon life, salvage and reserve factors.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - NEBRASKA

Effective January 1, 1991

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.6	13	53.0	7.4
2115 GARAGE WORK EQUIPMENT	6.5	5	80.2	2.3
2116 OTHER WORK EQUIPMENT	9.4	5	56.9	4.1
2121 BUILDINGS	19.0	4	37.2	3.1
2122 FURNITURE	—	5	95.0	5.0
2123 CO COMMUNICATION EQUIP	7.4	5	66.8	3.8
2123 OFFICE EQUIPMENT	8.5	5	15.2	9.4
2124 GEN'L PURPOSE COMPUTERS	4.6	5	11.2	18.2
2212 DIGITAL ELEC SWITCHING	14.3	3	23.7	5.1
2215 ELECTROMECH RECORDING	3.5	-5	93.0	3.4
2215 ELECTROMECH SWITCHING	2.9	-5	85.2	6.8
2232 CIRCUIT EQUIPMENT	7.3	5	43.1	7.1
2351 PUBLIC TEL TERM EQUIP	5.2	5	74.5	3.9
2362 OTHER TERMINAL EQUIP	6.5	4	75.1	3.2
2411 POLES	16.8	-50	77.3	4.3
2421 AERIAL CABLE-METALLIC	14.3	-25	65.1	4.2
2421 AERIAL CABLE-NON METAL	26.0	-15	58.3	2.2
2422 UNDERGROUND CABLE-METAL	22.0	-25	18.4	4.8
2422 UNERDGROUND CABLE-N MET	22.0	-15	14.1	4.6
2423 BURIED CABLE-METALLIC	15.4	-8	27.9	5.2
2423 BURIED CABLE-NON METAL	24.0	-7	14.4	3.9
2426 INTRABLDG NETWORK CABLE	12.3	-25	52.2	5.9
2431 AERIAL WIRE	6.5	-34	-138.7	42.0
2441 CONDUIT SYSTEMS	42.0	-10	29.0	1.9

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - OHIO

Effective January 1, 1991

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 MOTOR VEHICLES	4.4	12	46.0	9.5	0
2113 AIRCRAFT	5.0	48	18.9	6.6	0
2115 GARAGE WORK EQUIPMENT	8.9	0	38.5	6.9	-20
2116 OTHER WORK EQUIPMENT	8.4	8	30.4	7.3	-53
2121 BUILDINGS	17.0	0	33.9	3.9	152
2122 FURNITURE	12.7	5	56.3	3.0	208
2123 CO COMMUNICATION EQUIP	8.9	1	30.0	7.8	-573
2123 OFFICE EQUIPMENT	10.0	1	18.3	8.1	0
2124 GEN'L PURPOSE COMPUTERS	4.1	5	43.4	12.6	0
2211 ANALOG ELEC SWITCHING	7.2	-1	42.7	8.1	883
2212 DIGITAL ELEC SWITCHING	12.1	3	21.2	6.3	-159
2215 ELECTROMECH RECORDING	3.2	-1	34.5	20.8	0
2215 ELECTROMECH SWITCHING	3.4	0	53.9	13.6	0
2231 RADIO SYSTEMS	4.9	-1	71.0	6.1	10
2232 CIRCUIT EQUIPMENT	6.5	4	39.1	8.8	2924
2351 PUBLIC TEL*TERM EQUIP	4.6	5	51.5	9.5	-30
2362 OTHER TERMINAL EQUIP	6.4	1	80.3	2.9	0
2411 POLES	17.2	-52	41.2	6.4	-55
2421 AERIAL CABLE-METALLIC	17.8	-47	53.0	5.3	3248
2421 AERIAL CABLE-NON METAL	18.5	-25	11.7	6.1	3
2422 UNDERGROUND CABLE-METAL	19.4	-31	44.6	4.5	413
2422 UNDERGROUND CABLE-N MET	19.5	-16	7.9	5.5	0
2423 BURIED CABLE-METALLIC	13.0	-11	39.7	5.5	2261
2423 BURIED CABLE-NON METAL	22.0	-5	7.0	4.5	0
2426 SUBMARINE CABLE	12.6	0	53.5	3.7	-2
2426 INTRABLDG NETWORK CABLE	12.3	-47	35.0	9.1	0
2431 AERIAL WIRE	5.7	-61	85.5	13.2	113
2441 CONDUIT SYSTEMS	39.0	-11	25.6	2.2	-6

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988 are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE NORTH INCORPORATED - WISCONSIN

Effective January 1, 1991

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	4.5	14	39.9	10.2
2115 GARAGE WORK EQUIPMENT	7.7	0	68.1	4.1
2116 OTHER WORK EQUIPMENT	8.9	0	52.9	5.3
2121 BUILDINGS	21.0	0	25.1	3.6
2122 FURNITURE	10.0	6	12.3	8.2
2123 CO COMMUNICATION EQ	7.2	5	75.8	2.7
2123 OFFICE EQUIPMENT	8.0	5	12.9	10.3
2124 GEN'L PURPOSE COMPUTERS	4.1	5	32.0	15.4
2211 ANALOG ELEC SWITCHING	2.4	-1	85.8	6.3
2212 DIGITAL ELEC SWITCHING	14.1	3	28.6	4.9
2215 ELECTROMECH RECORDING	4.7	-3	-39.2	30.3
2215 ELECTROMECH SWITCHING	4.5	-5	66.4	8.6
2220 OPERATOR SYSTEMS ●	0.0	-3	77.2	0.0
2231 RADIO SYSTEMS	5.0	1	64.7	6.9
2232 CIRCUIT EQUIPMENT	6.4	4	23.3	11.4
2351 PUBLIC TEL TERM EQUIP	4.8	5	83.6	2.4
2362 OTHER TERMINAL EQUIP	5.9	1	96.3	0.5
2411 POLES	14.3	-47	65.3	5.7
2421 AERIAL CABLE-METALLIC	12.6	-37	43.2	7.4
2421 AERIAL CABLE-NON METAL	19.9	-20	12.3	5.4
2422 UNDERGROUND CABLE-METAL	20.0	-28	21.8	5.3
2422 UNDERGROUND CABLE-N MET	17.9	-15	6.9	6.0
2423 BURIED CABLE-METALLIC	12.5	-8	44.8	5.1
2423 BURIED CABLE-NON METAL	23.0	-7	13.6	4.1
2424 SUBMARINE CABLE	12.5	-10	56.5	4.3
2426 INTRABLDG NETWORK CABLE	12.3	-37	40.5	7.8
2431 AERIAL WIRE	4.6	-80	153.8	5.7
2441 CONDUIT SYSTEMS	40.0	-10	25.8	2.1

The figures in Columns B, C, and D are percentages of gross book cost.

● As described in paragraph 32 of the Order, the net service value for the Operator Systems Account is to be amortized over a twelve month period ending December 31, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - ALABAMA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	5.2	23	46.6	5.8	0
2115	GARAGE WORK EQUIP	8.6	0	62.2	4.4	1
2116	OTH WORK EQUIP	12.4	3	28.3	5.5	-22
2121	BUILDINGS	32.0	10	16.0	2.3	-70
2122	FURNITURE	11.9	2	39.6	4.9	2
2123	COMPANY COMM EQPT	6.4	0	43.9	8.8	-67
2123	OFFICE SUPPT. EQPT	9.5	2	37.9	6.3	-8
2124	GENL PURP COMP	3.3	5	62.4	9.9	0
2211	ANALOG ELECT SW	5.5	-1	16.0	15.5	0
2212	DIGITAL ELECT SW	12.7	5	18.4	6.0	0
2215	ELECTROMECHAN SW	3.3	-2	52.3	15.1	0
2220	OPERATOR SYSTEMS	20.0	5	0.0	4.8	0
2231	RADIO SYSTEMS	2.1	0	66.8	15.8	3
2232	CIRCUIT EQUIP	6.8	3	27.8	10.2	84
2351	PUBLIC TELEPHONES	5.7	2	44.4	9.4	-30
2362	OTH TERM EQUIP	2.3	-2	69.7	14.0	0
2411	POLES	13.3	-45	31.4	8.5	-32
2421	AERIAL CABLE-MET	16.3	-38	32.4	6.5	114
2421	AERIAL CAB-NONMET	17.8	-10	15.9	5.3	3
2422	UNDERGRND CAB N-MET	21.0	-2	15.0	4.1	2
2422	UNDERGRND CAB-MET	17.9	-15	29.1	4.8	80
2423	BURIED CAB-MET	13.5	-10	23.3	6.4	475
2423	BURIED CAB-NONMET	21.0	-5	13.3	4.4	2
2424	SUBMARINE CAB-MET	17.8	-5	25.7	4.5	0
2426	INTRABLDG NTWK CAB	16.6	-38	30.3	6.5	1
2431	AERIAL WIRE	5.3	-85	74.2	20.9	0
2441	CONDUIT SYSTEMS	43.0	-1	25.9	1.7	-4

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - GEORGIA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	3.9	19	48.8	8.3	0
2115	GARAGE WORK EQUIP	10.4	0	27.5	7.0	2
2116	OTH WORK EQUIP	9.8	5	38.5	5.8	-12
2121	BUILDINGS	28.0	0	19.2	2.9	-27
2122	FURNITURE	11.3	2	49.7	4.3	7
2123	COMP COMM. EQPT	6.3	0	42.1	9.2	-170
2123	OFFICE SUPPORT EQUIP	7.6	2	60.6	4.9	2
2124	GENERAL PURPOSE COMP	3.4	5	24.1	20.9	13
2211	ANALOG ELECT. SW	7.5	0	39.2	8.1	0
2212	DIGITAL ELECT. SW	12.3	3	15.1	6.7	78
2215	ELECTROMECH SW	4.5	-2	78.6	5.2	0
2220	OPERATOR SYSTEMS	19.0	3	0.0	5.1	0
2231	RADIO SYSTEMS	—	-4	54.7	—	●
2232	CIRCUIT EQUIPMENT	5.8	3	6.5	15.6	835
2351	PUBLIC TELEPHONES	6.3	2	48.1	7.9	-27
2362	OTH TERM EQUIP	3.5	-2	54.7	13.5	0
2411	POLES	12.9	-44	32.2	8.7	135
2421	AERIAL CABLE-MET	13.6	-35	32.0	7.6	288
2421	AERIAL CABLE-N-MET	18.5	-23	10.5	6.1	0
2422	UNDERGROUND CAB NMET	20.0	-12	12.3	5.0	0
2422	UNDERGROUND CAB-MET	15.3	-21	33.9	5.7	256
2423	BURIED CABLE-MET.	13.4	-6	24.1	6.1	942
2423	BURIED CABLE-N-MET.	22.0	-6	12.2	4.3	0
2424	SUBMARINE CAB MET	16.7	0	15.3	5.1	0
2424	SUBMARINE CAB N-MET	25.0	-1	5.5	3.8	0
2426	INTRABLDG. NETWK CAB	14.3	-35	33.3	7.1	3
2431	AERIAL WIRE	3.5	-80	93.3	24.8	170
2441	CONDUIT SYSTEMS	47.0	-1	17.6	1.8	-24

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Radio Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - SOUTH CAROLINA

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	5.1	14	36.9	9.6	-70
2115	GARAGE WORK EQUIP	9.5	0	35.5	6.8	0
2116	OTHER WORK EQUIP	9.8	0	44.9	5.6	7
2121	BUILDINGS	28.0	6	13.6	2.9	34
2122	FURNITURE	8.0	5	72.3	2.8	23
2123	OFFICE SUPPORT EQPT	9.5	2	69.9	3.0	9
2123	COMP COMM EQUIPMENT	6.6	0	50.6	7.5	0
2124	GEN'L PUR COMPUTERS	3.5	5	42.3	15.1	48
2211	ANALOG ELECT SW	—	0	—	—	●
2212	DIGITAL ELECT SW	12.2	5	20.0	6.1	85
2220	OPERATOR SYS-FUTURE	19.0	5	0.0	5.0	0
2220	OPERATOR SYS-PRESENT	—	0	—	—	●
2231	RADIO SYSTEMS	5.4	-5	-27.3	24.5	-10
2232	CIRCUIT EQUIPMENT	7.1	4	14.1	11.5	478
2351	PUBLIC TELEPHONES	5.3	2	61.0	7.0	0
2362	OTHER TERMINAL EQPT	3.6	-2	57.9	12.3	0
2411	POLES	14.8	-40	48.4	6.2	24
2421	AERIAL CABLE-METALL	12.1	-33	29.4	8.6	237
2421	AERIAL CABLE-NONMET	18.1	-25	15.6	6.0	0
2422	UNDERGROUND CA-MET	18.0	-15	23.7	5.1	23
2422	UNDERGROUND CA-NMET	21.0	-25	11.3	5.4	0
2423	BURIED CABLE-METALL	12.7	-6	21.1	6.7	452
2423	BURIED CABLE-NONMET	22.0	-6	9.1	4.4	0
2424	SUBMARINE CABLE-MET	7.3	-5	46.8	8.0	2
2426	INTRABLDG NETWK CA	12.3	-33	27.9	8.5	18
2431	AERIAL WIRE	2.7	-71	142.2	10.7	83
2441	CONDUIT SYSTEMS	41.0	-1	23.3	1.9	-1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, and as amended by Erratum DA 88-201, released February 19, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Analog Electronic Switching and Operator Systems-Present accounts are to be amortized over a thirty-six month period ending June 30, 1993.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTH INCORPORATED - TENNESSEE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	6.7	7	41.3	7.7	0
2115	GARAGE WORK EQUIP	8.7	0	61.8	4.4	0
2116	OTH WORK EQUIP	12.1	5	33.6	5.1	-15
2121	BUILDINGS	31.0	10	23.2	2.2	-15
2122	FURNITURE	11.8	10	42.0	4.1	3
2123	OFFICE SUPT EQPT	7.7	2	71.0	3.5	3
2123	COMP COMM EQPT	6.4	0	38.7	9.6	-27
2124	GENL PURP COMPT	3.0	5	67.3	9.2	0
2212	DIGITAL ELECT SW	12.9	10	27.1	4.9	14
2215	ELECTRO-MECH SW	1.8	-2	73.7	15.7	362
2220	OPERATOR SYSTEMS	20.0	10	9.8	4.0	0
2231	RADIO SYSTEMS	4.8	-2	54.0	10.0	11
2232	CIRCUIT EQUIPMENT	6.4	1	25.5	11.5	114
2351	PUBLIC TELEPHONES	5.1	2	60.5	7.4	-38
2362	OTH TERM EQUIP	2.8	-2	63.8	13.6	0
2411	POLES	13.1	-34	26.7	8.2	44
2421	AERIAL CAB NON-MET	18.5	-17	10.0	5.8	0
2421	AERIAL CAB-MET	16.4	-25	35.7	5.4	313
2422	UNDG CAB NON-MET	21.0	-8	9.3	4.7	0
2422	UNDG CAB-MET	19.5	-9	28.2	4.1	20
2423	BURIED CAB NON-MET	21.0	-5	19.1	4.1	0
2423	BURIED CAB-MET	12.0	-4	23.5	6.7	121
2426	INTRABLDG NETWK CAB	16.4	-25	34.6	5.5	1
2431	AERIAL WIRE	4.4	-85	127.1	13.2	0
2441	CONDUIT SYSTEMS	44.0	-1	24.4	1.7	-3

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - ARKANSAS

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	35.6	9.1	1
2112	PASSENGER CARS	3.2	16	57.4	8.3	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	56.9	6.7	0
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	42.1	8.5	0
2115	GARAGE WORK EQUIPMENT	13.2	2	56.2	3.2	-2
2116	MOBILE TOOLS	5.7	14	87.6	0.0	0
2116	TOOLS & OTHER WORK EQUIP	10.7	4	28.0	6.4	-13
2116	TRAILERS	8.4	21	48.4	3.6	-9
2121	BUILDINGS	23.0	1	21.6	3.4	-10
2122	FURNITURE	16.8	2	30.1	4.0	-1
2123	CO OFFICIAL-LARGE PBX	4.5	0	39.8	13.4	4
2123	CO OFFICIAL-STA APPARATUS	8.9	10	30.6	6.7	-22
2123	COM OFF LOCATED IN CO	5.4	0	3.2	17.9	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	80.7	1.9	0
2124	GENERAL PURPOSE COMPUTERS	3.6	2	38.1	16.6	5
2212	DIGITAL ELECTRONIC SWITCHING	12.9	5	14.1	6.3	14
2215	AUTO MESSAGE RECORDING	7.9	0	35.6	8.2	-125
2215	AUTOMATIC SWITCHING	7.9	-1	38.6	7.9	-435
2220	MANUAL SWITCHING	0.0	0	97.5	0.0	0
2231	RADIO SYSTEMS	16.1	5	23.1	4.5	2
2232	CIRCUIT EQUIPMENT	7.1	6	22.1	10.1	167
2351	PUBLIC TELEPHONE EQUIP	10.3	20	38.1	4.1	0
2362	E911 EQUIPMENT	3.6	0	30.4	19.3	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	75.3	2.8	0
2411	POLES	14.9	-72	68.8	6.9	173
2411	TOWERS	14.2	-54	0.0	10.8	0
2421	AERIAL CABLE	14.6	-26	48.1	5.3	222
2421	AERIAL CABLE-NONMETALLIC	17.7	0	18.4	4.6	0
2422	UNDERGROUND CABLE-METAL	15.1	-8	19.9	5.8	10
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	6.7	4.4	0
2423	BURIED CABLE-METAL	14.5	-11	33.4	5.4	491
2423	BURIED CABLE-NONMETALLIC	17.6	0	7.8	5.2	0
2426	INTRABUILDING CABLE-METALLIC	15.3	-26	39.2	5.7	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	0.0	5.6	0
2431	AERIAL WIRE	6.4	-231	152.7	27.9	156
2441	CONDUIT SYSTEMS	39.0	-5	13.6	2.3	-2

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
GTE SOUTHWEST INCORPORATED - NEW MEXICO

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	43.3	7.7	-7
2112	PASSENGER CARS	3.2	16	63.0	6.6	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	77.4	1.4	-8
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	82.1	0.9	-8
2115	GARAGE WORK EQUIPMENT	13.2	2	71.5	2.0	-1
2116	MOBILE TOOLS	5.7	14	90.4	0.0	-1
2116	TOOLS & OTHER WORK EQUIP	10.7	4	27.1	6.4	-10
2116	TRAILERS	8.4	21	28.5	6.0	-4
2121	BUILDINGS	26.0	3	20.7	2.9	59
2122	FURNITURE	16.8	2	28.8	4.1	-2
2123	CO OFFICIAL-LARGE PBX	4.5	0	81.4	4.1	-5
2123	CO OFFICIAL-STA APPARATUS	8.9	10	33.4	6.4	-12
2123	COM OFF LOCATED IN CO	5.4	0	13.2	16.1	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	86.2	1.0	5
2124	GENERAL PURPOSE COMPUTERS	3.6	2	28.2	19.4	0
2211	ANALOG SPC SWITCH-#2EAX ●	0.0	0	62.0	0.0	566
2212	DIGITAL ELECTRONIC SWITCHING	11.7	5	27.7	5.8	37
2215	AUTOMATIC MESSAGE RECORDING	0.0	6	0.0	0.0	0
2215	AUTOMATIC SWITCHING	0.0	6	60.2	0.0	0
2220	MANUAL SWITCHING	0.0	6	96.1	0.0	0
2220	T.S.P.S.	0.0	0	100.0	0.0	0
2231	RADIO SYSTEMS	16.1	5	36.7	3.6	13
2232	CIRCUIT EQUIPMENT	5.8	4	37.8	10.0	261
2351	PUBLIC TELEPHONE EQUIP.	10.3	20	41.1	3.8	-4
2362	E911 EQUIPMENT	3.6	0	8.2	25.5	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	67.5	3.8	0
2411	POLES	18.5	-62	77.8	4.6	107
2411	TOWERS	14.2	-54	63.8	6.4	-3
2421	AERIAL CABLE	13.3	-51	51.6	7.5	378
2421	AERIAL CABLE-NONMETALLIC	17.7	0	27.7	4.1	0
2422	UNDERGROUND CABLE-METAL	19.9	-2	38.0	3.2	57
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	11.8	4.2	0
2423	BURIED CABLE-METAL	15.3	-2	28.4	4.8	5
2423	BURIED CABLE-NONMETALLIC	17.6	0	9.4	5.1	0
2426	INTRABUILDING CABLE-METALLIC	13.5	-51	41.0	8.1	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	0.0	5.6	0
2431	AERIAL WIRE	6.1	-114	119.9	15.4	69
2441	CONDUIT SYSTEMS	41.0	-5	22.5	2.0	1

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, released January 22, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Analog Switching #2 Account is to be amortized over a forty-two month period, ending December 31, 1993.

Effective July 1, 1990

Rate Category	Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	HEAVY TRUCKS-1 TON AND OVER	5.3	16	35.8	9.1	-18
2112	PASSENGER CARS	3.2	16	36.0	15.0	0
2112	PICKUPS-VANS-LIGHT TRUCKS	3.9	17	45.5	9.6	-16
2112	SPCL EQUIP/MOTOR VEHICLES	5.3	13	38.7	9.1	-19
2115	GARAGE WORK EQUIPMENT	13.2	2	57.4	3.1	-1
2116	MOBILE TOOLS	5.7	14	54.9	5.5	10
2116	TOOLS & OTHER WORK EQUIP	10.7	4	32.9	5.9	-14
2116	TRAILERS	8.4	21	30.8	5.7	-1
2121	BUILDINGS	22.0	6	21.6	3.3	55
2122	FURNITURE	16.8	2	26.7	4.2	-11
2123	CO OFFICIAL-LARGE PBX	4.5	0	70.4	6.6	-5
2123	CO OFFICIAL-STA APPARATUS	8.9	10	47.2	4.8	-6
2123	COM OFF LOCATED IN CO	5.4	0	25.8	13.7	0
2123	OFFICE SUPPORT EQUIPMENT	6.6	7	57.0	5.5	1
2124	GENERAL PURPOSE COMPUTERS	3.6	2	35.3	17.4	0
2211	ANALOG SPC SWITCH-#2 EAX	0.0	0	100.0	0.0	0
2212	DIGITAL ELECTRONIC SWITCHING	12.1	5	21.3	6.1	112
2215	AUTO MESSAGE RECORDING	6.7	18	63.2	2.8	35
2215	AUTOMATIC SWITCHING	6.7	0	65.2	5.2	202
2220	MANUAL SWITCHING	0.0	3	97.9	0.0	0
2220	T.S.P.S.	0.0	0	100.0	0.0	0
2231	RADIO SYSTEMS	16.1	5	17.5	4.8	-58
2232	CIRCUIT EQUIPMENT	6.5	5	24.7	10.8	408
2351	PUBLIC TELEPHONE EQUIP.	10.3	20	46.7	3.2	5
2362	E911 EQUIPMENT	3.6	0	22.3	21.6	0
2362	HANDICAPPED EQUIPMENT	9.2	0	0.0	10.9	0
2362	TERMINAL EQUIPMENT	7.5	4	74.8	2.8	0
2411	POLES	14.9	-63	67.6	6.4	429
2411	TOWERS	14.2	-54	61.3	6.5	-7
2421	AERIAL CABLE	14.7	-33	42.7	6.1	425
2421	AERIAL CABLE-NONMETALLIC	17.7	0	20.0	4.5	0
2422	UNDERGROUND CABLE-METAL	16.3	7	15.6	4.7	51
2422	UNDERGROUND CABLE-NONMETAL	21.0	0	13.8	4.1	1
2423	BURIED CABLE-METAL	15.0	-10	32.0	5.2	163
2423	BURIED CABLE-NONMETALLIC	17.6	0	11.8	5.0	0
2424	SUBMARINE CABLE-METAL	23.0	0	7.7	4.0	-2
2426	INTRABUILDING CABLE-METALLIC	14.7	-33	21.2	7.6	0
2426	INTRABUILDING CABLE-NONMETAL	17.7	0	25.1	4.2	0
2431	AERIAL WIRE	3.9	-202	180.6	31.1	253
2441	CONDUIT SYSTEMS	45.0	-10	15.0	2.1	7

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-7, and as amended by Erratum DA-88-201, released January 22, 1988, are continued.

Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 HEAVY TRKS-1 TON & OVER	5.3	16	40.5	8.2	-35
2112 PASSENGER CARS	3.2	16	38.4	14.3	0
2112 PICKUPS-VANS-LT TRUCKS	3.9	17	32.2	11.5	0
2112 SPCL EQ/MOTOR VEHICLES	5.3	13	43.0	8.3	0
2113 AIRCRAFT	1.8	50	46.9	1.7	0
2115 GARAGE WORK EQUIPMENT	13.2	2	51.8	3.5	-14
2116 MOBILE TOOLS	5.7	14	67.1	3.3	0
2116 TOOLS & OTHER WK EQUIP	10.7	4	25.2	6.6	-309
2116 TRAILERS	8.4	21	34.4	5.3	-64
2121 BUILDINGS	23.0	13	19.4	2.9	513
2122 FURNITURE	16.8	2	30.5	4.0	-101
2123 CO OFFICIAL-LARGE PBX	4.5	0	66.4	7.5	0
2123 CO OFFICIAL-STATION APP	8.9	10	28.9	6.9	-747
2123 COM OFF LOCATED IN CO	5.4	0	11.4	16.4	0
2123 OFFICE SUPPORT EQUIP	6.6	7	50.1	6.5	0
2124 GEN'L PURPOSE COMPUTERS	3.6	5	35.6	16.5	106
2211 ANALOG SPC SWITCH-#1	0.0	4	98.9	0.0	0
2211 ANALOG SPC SWITCH-#2	2.8	4	27.3	24.5	163
2212 DIGITAL ELEC SWITCHING	12.8	5	19.8	5.9	1007
2215 AUTO MESSAGE RECORDING	0.0	0	99.4	0.0	0
2215 AUTOMATIC SWITCHING	5.4	0	73.6	4.9	0
2220 MANUAL SWITCHING	0.0	3	95.5	0.0	0
2220 T.S.P.S.	0.0	0	97.0	0.0	0
2231 RADIO SYSTEMS	16.1	5	35.8	3.7	40
2232 CIRCUIT EQUIPMENT	5.9	9	27.3	10.8	6396
2351 PUBLIC TELEPHONE EQUIP	10.3	20	22.2	5.6	-193
2362 E911 EQUIPMENT	3.6	0	42.9	15.9	0
2362 HANDICAPPED EQUIPMENT	9.2	0	100.0	0.0	0
2362 TERMINAL EQUIPMENT	7.5	4	48.9	6.3	0
2411 POLES	14.8	-65	55.4	7.4	1852
2411 TOWERS	14.2	-54	43.6	7.8	1
2421 AERIAL CABLE	14.7	-31	44.5	5.9	8700
2421 AERIAL CABLE-NONMETAL	17.7	0	14.5	4.8	8
2422 UNDERGROUND CABLE-METAL	19.2	-7	20.3	4.5	678
2422 UNDERGROUND CABLE-N MET	21.0	0	14.1	4.1	39
2423 BURIED CABLE-METAL	12.1	-9	28.8	6.6	5016
2423 BURIED CABLE-NONMETAL	17.6	0	13.6	4.9	24
2424 SUBMARINE CABLE-METAL	23.0	0	30.9	3.0	30
2424 SUBMARINE CABLE-N METAL	21.0	0	-95.3	9.3	0
2426 INTRABUILDING CABLE-MET	14.7	-31	27.1	7.1	0
2426 INTRABUILDING CABLE-N M	17.7	0	8.6	5.2	0
2431 AERIAL WIRE	5.0	-100	132.8	13.4	959
2441 CONDUIT SYSTEMS	43.0	-10	17.1	2.2	68

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-14, released January 22, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MAINE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	—	10	92.3	5.0	0
2114	SPEC PURP VEHICLES	6.6	8	47.9	6.7	0
2115	GARAGE WORK EQPT.	6.9	8	37.2	7.9	0
2116	OTHER WORK EQPT.	8.6	5	39.1	6.5	-17
2121	BUILDINGS	23.0	5	33.3	2.7	266
2122	FURNITURE	11.7	6	17.5	6.5	7
2123	OFFICE SUPP. EQPT.	8.4	7	25.9	8.0	0
2123	OFFICE COMM. EQPT.	6.5	7	40.9	8.0	195
2124	GEN PURP COMPUTERS	2.0	1	85.5	6.8	0
2211	ELECTRONIC SW ANALOG	7.2	2	48.8	6.8	937
2212	ELECTRONIC SW DIG	13.9	2	17.5	5.8	84
2215	ELECTRO-MECH.SW XBAR	—	-3	77.7	—	●
2215	ELECTRO-MECH.SW.SXS	—	-3	84.2	—	*
2220	OPERATOR SYSTEMS	5.9	0	35.0	11.0	0
2231	RADIO SYSTEMS	4.6	-5	53.3	11.2	-278
2232	CIRCUIT EQPT OTH-ANA	3.2	-2	39.3	19.6	4458
2232	CIRCUIT EQPT OTH-DIG	7.2	0	36.3	8.8	0
2232	CIRCUIT EQPT-DDS	2.5	-4	56.2	19.1	0
2311	STATION APPARATUS	8.4	1	22.5	9.1	-40
2351	PUB.TEL.TERM.EQPT.	4.3	1	61.5	8.7	337
2362	OTHER TERM. EQPT.	4.6	-2	50.2	11.3	0
2411	POLES	19.3	-49	39.1	5.7	-364
2421	AERIAL CA EX NMET	20.0	-25	7.8	5.9	0
2421	AERIAL CA TOLL NMET	21.0	-20	13.7	5.1	0
2421	AERIAL CAB EX MET	12.9	-26	42.4	6.5	4752
2421	AERIAL CAB TOLL MET	10.3	-21	61.2	5.8	1159
2422	UNDGRND CA EX MET	17.8	-34	36.9	5.5	790
2422	UNDGRND CA EX NMET	16.2	-31	13.4	7.3	0
2422	UNDGRND CA TOLL MET	10.4	-29	56.1	7.0	254
2422	UNDGRND CA TOLL NMET	21.0	-14	14.6	4.7	0
2423	BURIED CAB EX MET	12.6	-6	30.9	6.0	354
2423	BURIED CAB TOLL MET	8.5	-3	64.5	4.5	84
2424	SUBMAR CA TOLL NMET	27.0	-5	2.4	3.8	0
2424	SUBMARINE CA EX MET	9.8	-5	56.0	5.0	-46
2424	SUBMARINE CA TOLL MET	11.4	-5	59.0	4.0	-11
2426	INTRA NTWK CA EX MET	12.9	-26	22.5	8.0	0
2431	AERIAL WIRE	5.3	-37	66.5	13.3	-130
2441	CONDUIT	48.0	-5	17.2	1.8	187

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

● As described in paragraph 32 of the Order, the net service value for the Crossbar Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - MASSACHUSETTS
Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years)	(%)	(%)	(%)	($000)
	A	B	C	D=(100%-B-C)/A	E
2112 MOTOR VEHICLES	2.0	12	83.5	2.3	0
2114 SPEC PURP VEHICLES	6.5	2	65.4	5.0	0
2115 GARAGE WORK EQPT.	6.6	2	38.8	9.0	0
2116 OTHER WORK EQPT.	7.8	2	41.2	7.3	-169
2121 BUILDINGS	23.0	10	33.5	2.5	220
2122 FURNITURE	9.1	5	30.4	7.1	650
2123 OFFICE SUPP. EQPT.	8.5	8	13.9	9.2	0
2123 OFFICIAL COMM. EQPT.	5.5	8	41.2	9.2	-1611
2124 GEN PURP COMPUTERS	2.3	1	93.4	2.4	0
2211 ELECTRONIC SW ANALOG	7.4	3	45.7	6.9	14779
2212 ELECTRONIC SW DIGITAL	11.4	3	19.1	6.8	-92
2215 ELECTRO-MECH.SW. SXS	—	-2	77.5	—	*
2215 ELECTRO-MECH.SW. XBAR	—	-12	94.6	—	@
2220 OPERATOR SYSTEMS	5.0	0	51.7	9.7	0
2231 RADIO SYSTEMS	3.6	0	50.1	13.9	-393
2232 CIRCUIT EQPT OTH-DIG	6.9	1	33.5	9.5	0
2232 CIRCUIT EQPT-DDS	3.5	-2	43.5	16.7	-1025
2232 CIRCUIT EQ OTH-ANA.	3.6	0	46.6	14.8	8037
2311 STATION APPARATUS	3.0	1	88.2	3.6	0
2351 PUB.TEL.TERM.EQPT.	4.4	1	55.3	9.9	0
2362 OTHER TERM. EQPT. DDS	5.9	-1	24.1	13.0	-146
2362 OTH TERM. EQPT. OTH	4.4	-5	60.8	10.0	0
2411 POLE LINES	22.0	-102	51.0	6.9	3005
2421 AERIAL CA TOLL NMET	21.0	-23	9.2	5.4	0
2421 AERIAL CAB EX MET	14.4	-26	36.7	6.2	4773
2421 AERIAL CAB EX NMET	17.2	-25	6.8	6.9	0
2421 AERIAL CAB TOLL MET	9.1	-24	55.3	7.5	889
2422 UNDRGRND CAB EX MET	17.4	-43	40.7	5.9	8286
2422 UNDRGRND CAB EX NMET	16.3	-40	11.8	7.9	0
2422 UNDRGRND CAB TOLL MET	8.6	-35	60.8	8.6	2135
2422 UNDRGRND CAB TOLL NMET	20.0	-34	14.7	6.0	0
2423 BURIED CAB EX MET	17.5	-10	32.6	4.4	-46
2423 BURIED CAB EX NMET	17.8	-10	18.3	5.2	0
2423 BURIED CAB TOLL MET	6.8	-6	60.3	6.7	-69
2424 SUBMARINE CA TOLL NMET	26.0	-10	3.4	4.1	0
2424 SUBMARINE CAB EX MET	9.3	-10	87.1	2.5	-120
2424 SUBMARINE CAB TOLL MET	11.4	-10	64.0	4.0	-43
2426 INTRA NTWK CA EX MET	11.6	-26	8.8	10.1	0
2426 INTRA NWK CA EX NMET	17.5	-25	9.0	6.6	0
2431 AERIAL WIRE	6.0	-86	80.0	17.7	-68
2441 CONDUIT	45.0	-5	24.9	1.8	2129

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net service value for the Crossbar Account is to be amortized over a thirty month period ending December 31, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - NEW HAMPSHIRE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years)	(%)	(%)	(%)	($000)
		A	B	C	D=(100%-B-C)/A	E
2112	MOTOR VEHICLES	—	11	95.6	5.0	0
2114	SPEC PURP VEHICLES	7.0	4	19.9	10.9	0
2115	GARAGE WORK EQPT.	6.9	2	42.6	8.0	0
2116	OTHER WORK EQPT.	8.5	2	39.7	6.9	-40
2121	BUILDINGS	26.0	9	26.9	2.5	274
2122	FURNITURE	11.7	7	9.9	7.1	28
2123	OFFICE SUPP. EQPT.	8.7	9	46.2	5.1	0
2123	OFFICE COMM. EQPT.	4.9	9	40.3	10.3	125
2124	GEN. PURP. COMPUTERS	2.0	5	87.4	3.8	0
2211	ELECTRONIC SW ANA	8.0	3	22.9	9.3	907
2212	ELECTRONIC SW DIG	11.5	3	15.4	7.1	-189
2215	ELECTRO-MECH SW SXS	—	-3	78.4	—	*
2215	ELECTRO-MECH SW XBAR	—	-1	82.9	—	@
2220	OPERATOR SYSTEMS	5.3	0	44.4	10.5	0
2231	RADIO SYSTEMS	4.8	-2	46.4	11.6	-30
2232	CIRCUIT EQPT OTH-ANA	3.7	-3	55.7	12.8	3685
2232	CIRCUIT EQPT OTH-DIG	7.4	0	32.3	9.1	0
2232	CIRCUIT EQPT-DDS	3.6	-4	47.2	15.8	-4
2311	STATION APPARATUS	6.5	1	38.5	9.3	-72
2351	PUB.TEL.TERM.EQPT.	4.6	1	57.8	9.0	301
2362	OTH TERM EQPT DDS	5.9	2	16.3	13.8	-7
2362	OTH TERM EQPT OTH	4.3	-5	64.7	9.4	0
2411	POLES	19.5	-45	32.6	5.8	121
2421	AERIAL CA TOLL NMET	21.0	-17	11.6	5.0	0
2421	AERIAL CAB EX MET	13.2	-28	34.7	7.1	3385
2421	AERIAL CAB EX NMET	20.0	-27	7.8	6.0	0
2421	AERIAL CAB TOLL MET	10.5	-18	45.2	6.9	592
2422	UNDRGRND CA EX MET	17.9	-25	30.7	5.3	1118
2422	UNDRGRND CA EX NMMET	16.1	-23	10.9	7.0	0
2422	UNDRGRND CA TOLL MET	11.2	-18	44.2	6.6	277
2422	UNDRGRND CA TOLL NMET	20.0	-17	17.5	5.0	0
2423	BURIED CAB EX MET	12.5	-8	38.5	5.6	770
2423	BURIED CAB EX NMET	21.0	-8	41.1	3.2	0
2423	BURIED CAB TOLL MET	6.8	-5	72.4	4.8	99
2424	SUBMARINE CAB EX MET	16.7	-10	46.2	3.8	-11
2424	SUBMARINE CA TOLL MET	17.1	-5	38.2	3.9	-3
2426	INTRA NTWK CA EX MET	13.1	-28	18.6	8.4	0
2426	INTRA NWK CA EX NMET	20.0	-27	10.8	5.8	0
2431	AERIAL WIRE	6.1	-69	79.0	14.8	-243
2441	CONDUIT	44.0	-5	16.2	2.0	478

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net sevice value for the Crossbar Account is to be amortized over a twenty-four month period ending June 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - RHODE ISLAND

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	2.1	12	83.4	2.2	0
2115	GARAGE WORK EQPT.	6.7	5	31.5	9.5	0
2116	OTHER WORK EQPT.	7.9	0	44.8	7.0	4
2121	BUILDINGS	24.0	11	33.1	2.3	206
2122	FURNITURE	11.6	14	4.9	7.0	-39
2123	OFFICE SUPP.EQPT.	8.3	10	25.6	7.8	0
2123	OFFICIAL COMM. EQPT.	6.0	10	41.3	8.1	130
2124	GEN PURP COMPUTERS	2.1	1	93.4	2.7	0
2211	ELECTRONIC SW ANA	7.8	3	46.2	6.5	1798
2212	ELECTRONIC SW DIG	11.4	3	18.6	6.9	34
2215	ELECTRO-MECH SW SXS	—	-8	108.0	—	●
2215	ELECTRO-MECH SW XBAR	—	-3	-65.4	—	●
2220	OPERATOR SYSTEMS	4.7	0	92.9	1.5	0
2231	RADIO SYSTEMS	2.3	-5	29.2	33.0	-67
2232	CIRCUIT EQPT OTH DIG	7.5	1	39.0	8.0	0
2232	CIRCUIT EQPT. DDS	3.6	-2	58.9	12.0	0
2232	CIRCUIT EQPT OTH ANA	4.3	-1	45.2	13.0	1183
2311	STATION APPARATUS	7.1	1	24.7	10.5	-67
2351	PUB.TEL.TERM.EQPT.	4.2	1	56.0	10.2	428
2362	OTH TERM EQPT DDS	—	2	98.0	5.0	0
2362	OTH TERM EQPT OTH	4.8	-6	58.4	9.9	51
2411	POLE LINES	24.0	-92	48.4	6.0	618
2421	AERIAL CA EX MET	16.6	-35	45.9	5.4	2282
2421	AERIAL CA TOLL MET	7.2	-24	24.9	13.8	-58
2421	AERIAL CAB EX NMET	18.2	-32	20.1	6.1	0
2421	AERIAL CAB TOLL NMET	21.0	-23	15.8	5.1	0
2422	UNDGRND CA EX MET	17.4	-43	55.4	5.0	2157
2422	UNDGRND CA TOLL NMET	21.0	-20	10.8	5.2	0
2422	UNDRGRND CA EX NMET	17.1	-30	24.8	6.2	0
2422	UNDRGRND CA TOLL MET	7.6	-35	42.1	12.2	-7
2423	BURIED CAB EX MET	15.2	-5	41.2	4.2	105
2423	BURIED CAB EX NMET	17.8	-5	32.9	4.1	0
2423	BURIED CAB TOLL MET	6.1	-5	66.8	6.3	0
2424	SUBMARINE CA EX MET	12.9	-5	90.9	1.1	3
2424	SUBMARINE CA EX NMET	24.0	-5	13.5	3.8	0
2424	SUBMARINE CA TOLL MET	8.1	-5	37.8	8.3	-26
2424	SUBMARINE CA TOLL NMET	26.0	-5	4.1	3.9	0
2426	INTRA NTWK CA EX MET	15.0	-35	10.8	8.3	0
2431	AERIAL WIRE	6.3	-30	86.8	6.9	-48
2441	CONDUIT	37.0	-5	33.3	1.9	358

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

● As described in paragraph 32 of the Order, the net service value for the Step-by-Step and Crossbar accounts are to be amortized over a twelve month period ending June 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY - VERMONT

Effective July 1, 1990

	Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
		(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112	MOTOR VEHICLES	—	7	99.4	5.0	0
2114	SPEC PURP VEHICLES	8.6	0	42.6	6.7	0
2115	GARAGE WORK EQPT.	8.6	0	41.5	6.8	0
2116	OTHER WORK EQPT.	8.4	0	45.0	6.5	-19
2121	BUILDINGS	21.0	9	35.2	2.7	309
2122	FURNITURE	9.9	9	21.4	7.0	3
2123	OFFICE SUPP. EQPT.	8.6	9	24.1	7.8	0
2123	OFFICE COMM. EQPT.	6.2	9	36.1	8.9	113
2124	GEN PURP COMPUTERS	2.9	1	73.5	8.8	0
2211	ELECTRONIC SW ANA	7.0	1	47.0	7.4	1125
2212	ELECTRONIC SW DIG	11.3	1	16.7	7.3	-112
2215	ELECTRO-MECH SW XBAR	—	0	0.0	—	@
2215	ELECTRO-MECH. SW SXS	—	-2	89.2	—	*
2220	OPERATOR SYSTEMS	5.3	0	46.8	10.0	0
2231	RADIO SYSTEMS	2.8	-7	31.9	26.8	-64
2232	CIRCUIT EQPT DIS	2.7	-4	12.7	33.8	-3
2232	CIRCUIT EQPT OTH ANA	3.4	0	19.1	23.8	1594
2232	CIRCUIT EQPT OTH DIG	7.0	0	36.0	9.1	0
2311	STATION APPARATUS	8.4	1	27.0	8.6	-24
2351	PUB. TELEPHONE EQPT.	4.4	1	62.7	8.2	153
2362	OTH TERM. EQPT DIS	—	2	98.0	5.0	0
2362	OTH TERM. EQPT OTH	4.7	-7	49.0	12.3	0
2411	POLES	17.9	-60	45.6	6.4	849
2421	AERIAL CA EX MET	15.1	-35	43.2	6.1	2919
2421	AERIAL CA TOLL NMET	21.0	-17	9.7	5.1	0
2421	AERIAL CAB EX NMET	22.0	-33	11.0	5.5	0
2421	AERIAL CAB TOLL MET	10.6	-18	58.1	5.7	475
2422	UNDRGND CA EX MET	17.3	-38	34.4	6.0	327
2422	UNDRGND CA EX NMET	16.6	-36	18.2	7.1	0
2422	UNDRGND CA TOLL MET	10.3	-36	64.1	7.0	56
2422	UNDRGND CA TOLL NMET	20.0	-34	21.5	5.6	0
2423	BURIED CA TOLL NMET	20.0	-4	18.0	4.3	0
2423	BURIED CAB EX MET	16.1	-7	31.8	4.7	173
2423	BURIED CAB TOLL MET	8.9	-4	64.3	4.5	115
2424	SUBMAR CA TOLL NMET	26.0	-10	1.9	4.2	0
2424	SUBMARINE CA EX MET	10.5	-10	74.8	3.4	-1
2424	SUBMARINE CA TOLL MET	5.9	-10	89.1	3.5	-3
2426	INTRA NTWK CA EX MET	17.6	-35	11.0	7.0	0
2431	AERIAL WIRE	5.2	-73	82.9	17.3	0
2441	CONDUIT	44.0	-5	15.5	2.0	224

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

* As described in paragraph 32 of the Order, the net service value for the Step-by-Step Account is to be amortized over a thirty-six month period ending June 30, 1993.

@ As described in paragraph 32 of the Order, the net service for the Crossbar Account is to be amortized over a twelve month period ending June 30, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
OHIO BELL TELEPHONE COMPANY

Effective January 1, 1990

Rate Category	Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	4.4	14	31.9	12.3	0
2113	AIRCRAFT	6.5	14	28.2	8.9	-46
2115	GARAGE WORK EQPT.	7.1	6	54.6	5.5	-93
2116	OTHER WORK EQPT.	7.1	6	39.3	7.7	-603
2121	BUILDINGS	28.0	8	23.0	2.5	1292
2122	FURNITURE	13.7	5	22.2	5.3	717
2123	OFFICE EQUIPMENT	7.5	2	-9.8	14.4	239
2123	COMPANY COMM EQUIPMENT	6.0	0	43.1	9.5	-164
2124	GEN PURPOSE COMPUTERS	3.5	6	46.4	13.6	-414
2211	ANALOG ELECTRONIC	7.4	3	42.6	7.4	11773
2212	DIGITAL ELECTRONIC	10.8	3	18.6	7.3	569
2215	STEP-BY-STEP	1.1	-9	75.6	30.4	0
2215	CROSSBAR	1.9	-6	35.2	37.3	0
2220	OPERATOR SYSTEMS	5.7	-2	86.0	2.8	128
2231	RADIO SYSTEMS	4.6	1	47.6	11.2	-358
2232	CIRCUIT-DDS	4.8	10	10.6	16.5	25
2232	CIRCUIT-OTHER	6.5	1	36.3	9.6	5504
2351	PUBLIC TELEPHONE	6.4	0	58.1	6.5	13
2362	OTHER TERMINAL EQPT	3.3	1	66.1	10.0	-497
2411	POLES	16.0	-90	59.1	8.2	-185
2421	AERIAL CABLE	11.3	-15	51.0	5.7	7521
2422	UNDERGROUND CABLE	19.6	-16	37.9	4.0	10450
2423	BURIED CABLE	18.1	-9	30.8	4.3	2367
2424	SUBMARINE CABLE	6.8	-17	94.8	3.3	-11
2426	INTRA-BLDG CABLE	12.2	-19	43.2	6.2	950
2431	AERIAL WIRE	6.6	-72	150.8	3.2	0
2441	CONDUIT SYSTEMS	41.0	-18	29.2	2.2	6320

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - OREGON

Effective January 1, 1990

Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A
2112 MOTOR VEHICLES	5.7	15	30.6	9.5
2114 SPECIAL PURPOSE VEHICLES	7.5	10	17.4	9.7
2115 GARAGE WORK EQUIPMENT	7.6	10	56.5	4.4
2116 OTHER WORK EQUIPMENT	7.6	10	51.7	5.0
2121 BUILDINGS	29.0	1	24.2	2.6
2122 FURNITURE	9.3	18	41.5	4.4
2123 COMPANY COMM EQUIP	4.7	0	54.2	9.7
2123 OFFICE EQUIPMENT	8.5	9	16.7	8.7
2124 GEN PURPOSE COMPUTERS	2.8	9	35.6	19.8
2211 ANALOG ELECTRONIC	7.5	2	43.6	7.3
2212 DIGITAL ELECTRONIC	12.2	5	17.0	6.4
2220 OPERATOR SYSTEMS	7.0	5	25.6	9.9
2231 RADIO SYSTEMS	8.7	-5	41.6	7.3
2232 CIRCUIT-ANALOG	6.6	0	36.7	9.6
2232 CIRCUIT-DDS	7.2	20	30.9	6.8
2232 CIRCUIT-DIGITAL	8.3	3	28.8	8.2
2351 PUBLIC TELEPHONE-TERMINAL EQUIP	6.3	6	74.9	3.0
2362 OTHER TERMINAL EQUIP	5.0	0	34.1	13.2
2411 POLE LINES	12.9	-57	48.4	8.4
2421 AERIAL CABLE-METAL	14.2	-16	38.7	5.4
2421 AERIAL CABLE-NON METAL	18.3	-25	22.4	5.6
2422 UNDERGROUND CABLE-METAL	17.1	-6	33.6	4.2
2422 UNDERGROUND CABLE-NON METAL	21.0	-16	12.6	4.9
2423 BURIED CABLE-METAL	18.4	-9	31.3	4.2
2423 BURIED CABLE-NON METAL	22.0	-9	4.4	4.8
2424 SUBMARINE CABLE-METAL	11.1	-4	69.7	3.1
2424 SUBMARINE CABLE-NON METAL	30.0	-4	0.0	3.5
2426 INTRABLDG NTWK CABLE-METAL	10.5	-18	46.9	6.8
2426 INTRABLDG NTWK CABLE-NON METAL	18.0	-25	21.9	5.7
2431 AERIAL WIRE	6.2	-52	86.4	10.6
2441 CONDUIT SYSTEMS	36.0	-7	22.9	2.3

The figures in Columns B, C, and D are percentages of gross book cost.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
PACIFIC NORTHWEST BELL TELEPHONE COMPANY - WASHINGTON

Effective January 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 MOTOR VEHICLES	6.1	15	37.5	7.8	0
2113 AIRCRAFT	—	50	50.0	5.0	0
2114 SPECIAL PURPOSE VEHICLES	6.5	7	53.4	6.1	0
2115 GARAGE WORK EQUIPMENT	6.8	7	57.2	5.3	0
2116 OTHER WORK EQUIP	7.2	7	45.1	6.7	0
2121 BUILDINGS	34.0	4	16.8	2.3	-747
2122 FURNITURE	11.8	22	38.3	3.4	-397
2123 COMPANY COMM EQUIPMENT	5.3	-1	44.8	10.6	-1065
2123 OFFICE SUPPORT EQUIP	8.4	6	31.5	7.4	0
2124 GEN PURPOSE COMPUTER	3.0	10	46.2	14.6	0
2211 ANALOG ELECTRONIC	8.2	2	42.9	6.7	9438
2212 DIGITAL ELECTRONIC	12.8	5	16.5	6.1	-80
2220 OPERATOR SYSTEMS	6.7	5	20.9	11.1	0
2231 RADIO SYSTEMS	8.2	0	22.5	9.5	-118
2232 CIRCUIT-ANALOG	6.9	0	37.4	9.1	4452
2232 CIRCUIT-DDS	6.4	10	34.2	8.7	-156
2232 CIRCUIT-DIGITAL	8.2	3	26.0	8.7	0
2311 STATION APPARATUS	—	—	—	—	3
2351 PUBLIC TELEPHONE EQUIP	6.8	5	59.0	5.3	-516
2363 OTHER TERMINAL EQUIP	5.8	0	44.8	9.5	-1307
2411 POLE LINES	13.7	-75	57.1	8.6	1415
2421 AERIAL CABLE-METAL	13.8	-25	38.9	6.2	1803
2421 AERIAL CABLE-NON METAL	16.5	-25	-11.5	8.3	0
2422 UNDERGROUND CABLE-METAL	17.5	-22	40.1	4.7	5435
2422 UNDERGROUND CABLE-NON METAL	22.0	-22	13.8	4.9	0
2423 BURIED CABLE-METALC	17.0	-7	29.6	4.6	618
2423 BURIED CABLE-NON METAL	19.6	-7	12.8	4.8	0
2424 SUBMAINE CABLE-METAL	11.9	5	46.8	4.1	-153
2424 SUBMARINE CABLE-NON METAL	17.8	-1	42.3	3.3	0
2426 INTRABLDG NETWORK-METAL	11.0	-20	42.1	7.1	0
2426 INTRABLDG NETWORK-NON METAL	16.1	-22	13.7	6.7	0
2431 AERIAL WIRE	4.3	-83	126.0	13.3	0
2441 CONDUIT SYSTEMS	37.0	-8	22.5	2.3	1046

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - ALABAMA

Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 Motor Vehicles	4.0	12	43.8	11.1	0
2113 Aircraft	6.9	60	0.0	5.8	0
2115 Garage Work Equip	11.1	2	32.4	5.9	17
2116 Other Work Equip	11.1	2	32.4	5.9	162
2121 Buildings	36.0	4	20.5	2.1	151
2122 Furniture	12.6	9	20.2	5.6	-60
2123 Office Equipment	4.2	26	20.2	12.8	-28
2124 Gen Purpose Computers	3.4	5	40.9	15.9	0
2211 Analog ESS	7.9	2	40.0	7.3	6730
2212 Digital ESS	12.3	2	16.9	6.6	-259
2215 Crossbar	—	-3	103.0	5.0	0
2215 Step-by-Step	—	-7	107.0	5.0	0
2220 Operator Systems	9.3	2	74.9	2.5	-1
2231 Radio Systems	6.0	0	27.6	12.1	-22
2232 Circuit-DDS	4.1	10	35.5	13.3	0
2232 Circuit-Other	5.3	2	33.4	12.2	5489
2311 Station Apparatus	5.1	2	6.5	17.9	0
2341 Large PBX	4.6	-4	40.2	13.9	0
2351 Public Telephone	3.4	20	48.5	9.3	0
2362 Other Terminal Equip	3.7	-4	42.6	16.6	0
2411 Poles	22.0	-40	38.6	4.6	-110
2421 Aerial Cable-Metal	13.6	-17	39.3	5.7	653
2421 Aerial Cable-Non Metal	16.3	-20	18.7	6.2	-7
2422 U G Cable-Metal	17.3	-13	43.0	4.0	5173
2422 U G Cable-Non Metal	19.0	-20	21.0	5.2	53
2423 Buried Cable-Metal	15.2	-6	36.1	4.6	5905
2423 Buried Cable-Non Metal	11.5	-11	20.7	7.9	-8
2424 Submarine Cable	14.5	0	43.4	3.9	-15
2426 Intra-Bldg Cable	11.6	-11	33.7	6.7	23
2431 Aerial Wire	16.6	-78	66.9	6.7	-110
2441 Conduit Systems	50.0	-5	21.7	1.7	243

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - KENTUCKY

Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 Motor Vehicles	3.9	15	38.7	11.9	0
2115 Garage Work Equip	13.0	1	23.6	5.8	1
2116 Other Work Equip	13.0	1	23.6	5.8	14
2121 Buildings	30.0	3	25.0	2.4	798
2122 Furniture	8.8	5	33.3	7.0	44
2123 Office Equipment	4.6	27	13.4	13.0	-419
2124 Gen Purpose Computers	3.3	1	17.3	24.8	0
2211 Analog ESS	6.4	2	41.8	8.8	5418
2212 Digital ESS	12.2	3	13.1	6.9	53
2215 Crossbar	—	-3	103.0	5.0	*0
2215 Step-by-Step	—	-4	104.0	5.0	0
2220 Operator Systems	6.3	3	84.7	2.0	0
2231 Radio Systems	6.4	-5	30.0	11.7	-127
2232 Circuit-DDS	4.2	10	21.8	16.2	0
2232 Circuit-Other	6.6	2	32.6	9.9	-411
2311 Station Apparatus	3.3	4	0.0	29.1	0
2341 Large PBX	3.9	-4	20.0	21.5	0
2351 Public Telephone	3.0	20	59.4	6.9	0
2362 Other Terminal Equip	3.3	-4	50.6	16.2	0
2411 Poles	20.0	-49	41.5	5.4	-42
2421 Aerial Cable-Metal	12.8	-13	40.9	5.6	945
2421 Aerial Cable-Non Metal	19.7	-13	14.4	5.0	-18
2422 U G Cable-Metal	17.3	-19	43.8	4.3	3339
2422 U G Cable-Non Metal	19.1	-7	13.6	4.9	-39
2423 Buried Cable-Metal	14.5	-10	40.0	4.8	5657
2423 Buried Cable-Non Metal	13.9	-3	9.8	6.7	-3
2424 Submarine Cable	16.7	0	37.7	3.7	-1
2426 Intra-Bldg Cable	11.9	-6	29.6	6.4	32
2431 Aerial Wire	12.0	-32	56.1	6.3	-264
2441 Conduit Systems	50.0	-5	19.5	1.7	69

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - LOUISIANA

Effective July 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate	Annual Amort. Expense
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A	($000) E
2112 Motor Vehicles	4.3	10	42.2	11.1	0
2114 Special Purpose Vehicles	13.0	1	2.7	7.4	0
2115 Garage Work Equip	13.0	1	2.7	7.4	-56
2116 Other Work Equip	13.0	1	2.7	7.4	-629
2121 Buildings	31.0	5	25.1	2.3	1006
2122 Furniture	6.9	2	52.8	6.6	363
2123 Office Equipment	4.1	27	17.8	13.5	140
2124 Gen Purpose Computers	3.4	0	29.0	20.9	0
2211 Analog ESS	6.9	2	51.2	6.8	13402
2212 Digital ESS	12.2	1	22.4	6.3	-325
2215 Crossbar	1.0	-3	86.1	16.9	0
2215 Manual	5.4	-8	0.0	20.0	0
2215 Step-by-Step	2.3	-8	42.4	28.5	0
2220 Operator Systems	—	-2	101.7	5.0	-2
2231 Radio Systems	6.6	-5	41.7	9.6	190
2232 Circuit-DDS	4.2	10	9.1	19.3	0
2232 Circuit-Other	6.0	0	39.1	10.2	-217
2311 Station Apparatus	5.4	4	-2.4	18.2	0
2341 Large PBX	4.0	-4	14.7	22.3	0
2351 Public Telephone	3.6	20	48.2	8.8	0
2362 Other Terminal Equip	3.1	-4	46.3	18.6	0
2411 Poles	18.6	-49	41.2	5.8	-91
2421 Aerial Cable-Metal	10.4	-11	42.9	6.5	948
2421 Aerial Cable-Non Metal	16.3	-20	19.1	6.2	3
2422 U G Cable-Metal	17.5	-9	35.3	4.2	4860
2422 U G Cable-Non Metal	19.1	-20	21.3	5.2	109
2423 Buried Cable-Metal	10.9	-10	48.3	5.7	25345
2423 Buried Cable-Non Metal	11.8	-10	20.2	7.6	-1
2424 Submarine Cable	10.3	-1	39.9	5.9	-183
2426 Intra-Bldg Cable	11.4	-5	39.4	5.8	162
2431 Aerial Wire	4.8	-4	-13.9	24.6	-369
2441 Conduit Systems	50.0	-5	18.2	1.7	-3

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - MISSISSIPPI

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	Motor Vehicles	3.5	12	43.4	12.7	0
2115	Garage Work Equip	11.1	-2	26.7	6.8	6
2116	Other Work Equip	11.1	-2	26.7	6.8	40
2121	Buildings	33.0	2	22.2	2.3	221
2122	Furniture	8.9	3	39.1	6.5	75
2123	Office Equipment	4.0	28	20.6	12.9	31
2124	Gen Purpose Computers	3.4	0	59.3	12.0	0
2211	Analog ESS	6.7	2	37.1	9.1	2667
2212	Digital ESS	12.1	3	17.4	6.6	212
2215	Step-by-Step	—	-8	108.0	5.0	0
2215	Crossbar	1.9	-3	26.9	40.1	0
2220	Operator Systems	—	3	98.6	5.0	1
2231	Radio Systems	6.5	-7	51.5	8.5	100
2232	Circuit-Other	5.9	2	33.0	11.0	3009
2232	Circuit-DDS	4.0	10	34.7	13.8	0
2311	Station Apparatus	2.4	2	73.8	10.1	0
2341	Large PBX	3.5	-4	26.1	22.3	0
2351	Public Telephone	3.8	20	46.5	8.8	0
2362	Other Terminal Equip	3.7	-4	48.0	15.1	0
2411	Poles	19.9	-62	30.6	6.6	-1797
2421	Aerial Cable-Metal	10.9	-19	45.9	6.7	3123
2421	Aerial Cable-Non Meta	16.6	-10	15.1	5.7	0
2422	U G Cable-Metal	17.2	-28	42.9	4.9	2404
2422	U G Cable-Non Metal	15.1	-20	24.2	6.3	18
2423	Buried Cable-Metal	12.0	-10	40.7	5.8	7976
2423	Buried Cable-Non Metal	11.7	-5	20.0	7.3	8
2424	Submarine Cable	10.4	-5	33.0	6.9	34
2426	Intra-Bldg Cable	11.7	-12	37.7	6.4	72
2431	Aerial Wire	15.7	-76	63.6	7.2	-717
2441	Conduit Systems	49.0	-5	19.1	1.8	-272

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTH CENTRAL BELL TELEPHONE COMPANY - TENNESSEE

Effective July 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	Motor Vehicles	4.2	16	42.1	10.0	0
2115	Garage Work Equip	13.1	-1	21.8	6.0	-16
2116	Other Work Equipment	13.1	-1	21.8	6.0	-200
2121	Buildings	30.0	1	25.9	2.4	-44
2122	Furniture	11.0	9	30.2	5.5	55
2123	Office Equipment	3.9	28	19.1	13.6	15
2124	Gen Purpose Computers	3.6	2	57.5	11.3	0
2211	Analog ESS	7.6	3	43.6	7.0	11571
2212	Digital ESS	12.2	5	14.5	6.6	185
2215	Step-by-Step	2.2	-8	54.7	24.2	0
2215	Crossbar	—	-3	103.0	5.0	0
2220	Operator Systems	7.7	5	21.6	9.5	4
2231	Radio Systems	7.8	0	23.3	9.8	-564
2232	Circuit-Other	6.2	2	34.3	10.3	2988
2232	Circuit-DDS	4.4	10	47.0	9.8	0
2311	Station Apparatus	4.6	4	7.4	19.3	0
2341	Large PBX	4.6	-4	10.7	20.3	0
2351	Public Telephone	3.8	20	42.0	10.0	0
2362	Other Terminal Equip	3.2	3	66.3	9.6	366
2411	Poles	23.0	-48	28.1	5.2	-3210
2421	Aerial Cable-Metal	12.7	-15	43.2	5.7	6886
2421	Aerial Cable-Non Metal	20.0	-20	9.5	5.5	-7
2422	U G Cable-Metal	17.0	-9	37.0	4.2	4802
2422	U G Cable-Non Metal	19.2	-20	16.5	5.4	5
2423	Buried Cable-Metal	13.6	-5	40.7	4.7	12532
2423	Buried Cable-Non Metal	13.1	-9	23.9	6.5	-31
2424	Submarine Cable	15.4	-1	36.3	4.2	-10
2426	Intra-Bldg Cable	13.6	-10	25.9	6.2	172
2431	Aerial Wire	14.5	-40	36.6	7.1	-1851
2441	Conduit Systems	49.0	-5	21.2	1.7	-119

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
SOUTHERN NEW ENGLAND TELEPHONE COMPANY - CONNECTICUT

Effective January 1, 1990

	Rate Category Description	Average Remaining Life (years) A	Future Net Salvage (%) B	Reserve Level (%) C	Remaining Life Rate (%) D=(100%-B-C)/A	Annual Amort. Expense ($000) E
2112	MOTOR VEHICLES	5.0	8	42.2	10.0	0
2115	GARAGE WORK EQ	12.1	0	18.3	6.8	10
2116	OTHER WORK EQ	5.5	2	35.3	11.4	431
2121	BUILDINGS	25.0	-5	30.1	3.0	-588
2122	FURNITURE	8.4	1	49.7	5.9	871
2123	OFFICE SUPPORT EQ	8.0	0	55.0	5.6	226
2123	CO COMM EQ	5.2	3	54.4	8.2	0
2124	GENL PURPOSE COMP	3.9	1	47.5	13.2	0
2200	OPERATOR SYS-DIGITAL	19.0	2	0.0	5.2	0
2200	OPERATOR SYS-OTHER	1.5	0	71.5	19.0	555
2211	ANALOG ESS	8.2	-1	37.2	7.8	10114
2212	DIGITAL ESS	12.1	2	16.0	6.8	160
2215	STEP-BY STEP SWITCH	—	-5	55.4	—	●
2215	CROSSBAR SWITCH	—	-4	104.0	—	●
2231	RADIO SYSTEMS	5.9	0	52.0	8.1	-24
2232	DIGITAL DATA SYSTEMS	5.6	6	56.7	6.7	0
2232	DIGITAL CKT-OTHER	8.7	0	27.2	8.4	0
2232	ANALOG CKT-OTHER	5.8	-3	59.8	7.4	3443
2351	PUBLIC TELEPHONE	5.1	1	57.3	8.2	62
2362	OTE-PBX	4.6	0	85.7	3.1	0
2362	OTE-TEL+MISC	4.6	0	28.6	15.5	-427
2411	POLES	21.0	-73	47.1	6.0	-1066
2421	AERIAL CABLE	16.7	-27	38.2	5.3	2628
2422	U G CABLE-METALLIC	18.5	-22	41.6	4.3	4243
2422	U G CABLE-NON METAL	26.0	-6	13.9	3.5	0
2423	BURIED CABLE	19.1	-9	28.7	4.2	1101
2424	SUBMARINE CABLE	11.4	0	54.0	4.0	7
2426	INTRABUILDING NET CA	15.5	-27	43.8	5.4	518
2441	CONDUIT SYSTEMS	38.0	-10	29.9	2.1	2424

The figures in Columns B, C, and D are percentages of gross book cost.

The reserve level in Column C is used to calculate the depreciation rate and does not necessarily reflect the book reserve. The amortization amounts in Column E, ordered in FCC 88-13, released January 21, 1988, are continued.

● As described in paragraph 32 of the Order, the net service values for the Step-by-Step and Crossbar accounts are to be amortized over a twenty-four month period ending December 31, 1991.

FEDERAL COMMUNICATIONS COMMISSION
Schedule of Annual Percentages of Depreciation for
UNITED INTER-MOUNTAIN TELEPHONE - WEST VIRGINIA

Effective January 1, 1990

Rate Category Description	Average Remaining Life	Future Net Salvage	Reserve Level	Remaining Life Rate
	(years) A	(%) B	(%) C	(%) D=(100%-B-C)/A
2121 BUILDINGS	20.0	0	0.0	5.0
2232 CIRCUIT EQUIPMENT	14.0	2	0.0	7.0
2421 AERIAL CABLE-NON METAL	30.0	-20	0.0	4.0

The figures in Columns B, C, and D are percentages of gross book cost.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-133

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules regarding revision of the high frequency (HF) channels for the maritime mobile service to implement the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 10, 1991; Released: January 30, 1991

By the Commission:

I. INTRODUCTION

1. This *Report and Order* adopts changes to the Commission's Rules that substantially revise the channeling plans in the high frequency bands between 4000-27500 kHz (HF bands) allocated exclusively to the maritime mobile service. This proceeding continues the implementation of the Final Acts of the 1987 World Administrative Radio Conference for Mobile Services (1987 Mobile WARC) into the Commission's Rules.[1] These revisions will take effect at 0001 hours Coordinated Universal Time (UTC) on July 1, 1991, in accordance with international provisions. They will affect every existing maritime station, coast and ship, public and private, that operates on frequencies between 4000 kHz and 27500 kHz.

II. BACKGROUND

2. A major task of the 1987 Mobile WARC was to rearrange the channelling of the exclusive maritime mobile HF bands, which had not been reviewed since 1974, and to incorporate the new bands that had been allocated for the maritime mobile service by the 1979 World Administrative Radio Conference. The objective was to permit the new spectrum to be used for the newer forms of maritime mobile systems and expand the capabilities of existing systems. Consequently, the revisions reflect an increase in frequency spectrum for digital selective calling (DSC), narrow-band direct-printing (NBDP), and radiotelephony (voice), and a decrease in frequency spectrum for manual Morse code telegraphy.[2] The existing frequencies for these services also were rearranged to accommodate the new channelling scheme. Additionally, the amount of spectrum allocated for coast station wideband telegraphy was preserved without reduction but the allocation was shifted in frequency.

3. To enact these changes, we proposed in the *Notice of Proposed Rule Making* (*Notice*) to reflect the requirements adopted internationally in 47 C.F.R. § 2.106, Table of Frequency Allocations, and the frequency tables contained in 47 C.F.R. Part 80, Stations in the Maritime Services. We also proposed procedures for modification of licenses, notification of ship and coast station operators, transfer of operating frequencies, and the application process for new frequency assignments. [3] Mobile Marine Radio, Inc. (MMR), licensee of public coast station WLO, Mobile, Alabama, filed comments, and Rockwell International Corporation (Rockwell), licensee of several private coast stations and a manufacturer of HF equipment, filed reply comments.

III. DISCUSSION

4. The frequency revisions in the maritime HF bands between 4000 kHz and 27500 kHz are extensive. Generally, the proposals were well received. Many of the revisions are table revisions, direct substitutions of frequencies, or extensions of existing frequency tables that are necessary to conform to international regulations. Because these changes are straightforward and generated no comments, we adopt them as proposed. *See* attached Appendix. Our discussion here will focus on the complex frequency changes that generated comments or reply comments.

5. *Morse code telegraphy*. For Morse code ship stations, we proposed in the *Notice* to repeat the same operating frequencies several times to maintain the format of the 62 Channel Series currently in 47 C.F.R. § 80.357(a).[4] For Morse code coast stations, we proposed to add 4.4 kilohertz of the 22.5 kilohertz made available by the 1987 Mobile WARC at 26 MHz to the table of coast station frequencies in 47 C.F.R. § 80.357(b).[5]

6. MMR supports the proposed 62 Channel Series approach for ship stations, but requests that the new 18 MHz simplex frequencies available for NBDP as well as Morse code be added to the table of 62 Channel Series for Morse code operations.[6] It argues that the additional frequencies are necessary to offset the reduction of Morse code spectrum, that it experienced a growth in Morse code traffic during the decade of 1979-1989, and that the use of these frequencies for Morse code is compatible with NBDP operations. MMR further requests that the 50 kilohertz of spectrum at 19 MHz and all 22.5 kilohertz of spectrum at 26 MHz be added to the Rules for coast station Morse code telegraphy operations.[7] It also notes that a channel spacing of 500 Hz, rather than 400 Hz, is necessary and that a 1-2 kilohertz separation is needed between coast station assignments.[8]

7. We have reviewed the concerns regarding spectrum for coast stations Morse code telegraphy.[9] Internationally, the 50 kilohertz of spectrum at 19 MHz and the 22.5 kilohertz of spectrum at 26 MHz are not channelized but left flexible for various uses by coast stations (Morse code telegraphy, wideband telegraphy, facsimile, and special (undefined) transmission systems). Furthermore, this is shared government/non-government spectrum that must be coordinated and its use must be notified to the International Frequency Registration Board (IFRB). Consequently, it is difficult to access the needs of the industry at this time, and there is no assurance that the frequencies we add to the Rules will be accepted internationally. Thus, rather than listing discrete frequencies, we will amend 47

C.F.R. § 80.357(b) to include the frequency bands that are available for coast station Morse code telegraphy; thereby, the 50 kilohertz of spectrum at 19 MHz and the 22.5 kilohertz of spectrum at 26 MHz will be available for application as suggested by MMR. This approach will allow applicants flexibility to request assignments from the new spectrum.[10] We emphasize, however, that frequency assignments in these bands are subject to intra-government coordination and international notification requirements.

8. Further, we find it unnecessary to add the 18 MHz simplex frequencies to the table of 62 Channel Series for ship Morse code telegraphy as suggested by MMR. As proposed, these frequencies would be added to the existing table of NBDP simplex frequencies and permitted to be used for Morse code telegraphy if the allocated Morse code spectrum (*i.e.*, the 62 Channel Series) were not adequate for communications.[11] Consequently, as proposed, the new 18 MHz simplex frequencies would be available to ship stations for Morse code telegraphy. Moreover, it appears that MMR's comments regarding the 18 MHz spectrum for ship station Morse code operations were due, in part, to our proposal concerning coast station spectrum in the 19 and 26 MHz bands.[12] Thus, we will adopt the changes to 47 C.F.R. § 80.357(a)(3)(i) as proposed; that is, the 18 MHz ship frequencies will be added to the NBDP frequency table but made available for Morse code telegraphy if the 62 Channel Series frequencies are inadequate. This follows the objective of the 1987 Mobile WARC to move spectrum to the newer forms of communications while permitting access to the spectrum as needed.

9. *Digital selective calling.* Because the 1987 WARC tripled the number of DSC frequencies, we proposed in the *Notice* to replace the one table of frequencies in 47 C.F.R. § 80.359(a) with three tables of paired frequencies: a "Worldwide" table, an "Atlantic" table, and a "Pacific" table. As proposed, public coast stations would be assigned the "worldwide" series and one "regional" series depending upon their locations.[13] MMR agrees with creating a "worldwide" and two "regional" tables of paired frequencies, but opposes restricting the use of these frequencies by assigning only two series of frequencies to public coast stations. Instead, it requests that all frequencies be made available to all coast or ship stations but their use should be governed by the location of coast or ship stations being contacted, similar to Morse calling frequencies in 47 C.F.R. § 80.355(c)(2).[14] As MMR points out, this change would enhance shore-to-ship communications by limiting the number of calling frequencies to be monitored by ship stations. Otherwise, if the amendments were adopted as proposed, ships would need to scan all DSC frequencies or make prior arrangements to receive calls.

10. Rockwell supports MMR's comments regarding DSC frequencies.[15] It further notes that our proposal would exclude private coast station use and opposes this change stating "[i]mportant and useful business and operational communications are exchanged between private coast stations and ships and it would be, in our opinion, a counterproductive step to now deny full DSC capability to users of this class of maritime communications service . . . The basic purpose of DSC should, as originally intended, be to facilitate calling for all classes of service and all types of communications systems for the maritime community."[16]

11. We agree with the comments of MMR and Rockwell concerning DSC communications. We have revised 47 C.F.R. § 80.359(a) to permit all coast and ship stations to use the frequencies for its geographic region. Both public and private stations will have access to all DSC frequencies as requested. Ship stations would only need to monitor the frequencies authorized in their geographic region. These changes, suggested by MMR and Rockwell, will encourage the growth of DSC.

12. *Duplex radiotelephony for public correspondence.* The 1987 Mobile WARC allocated an additional 70 paired frequencies for duplex radiotelephony (duplex channels). These were divided equally between government and non-government users. In the *Notice*, we proposed that the 35 non-government duplex channels be added for public correspondence. Before the additional channels could be added to the Commission's Rules, however, a worldwide allotment plan had to be developed by the International Frequency Registration Board (IFRB). We requested comments as to the equitable geographical distribution of the duplex channels.

13. MMR supports adding the new duplex channels for public correspondence and asks that we complete this proceeding before IFRB's decision on the new duplex allotments. It suggests that the Commission make the new channels available for application and subsequently conform the allotment table in 47 C.F.R. § 80.371(b) to reflect the assignments.[17] MMR indicates that this approach would expedite this rule making and allow the allotment decisions to be made more appropriately in the context of the application process.

14. With regard to the 35 additional non-government duplex channels made available by the 1987 Mobile WARC, 79 percent of our allotment requests which we submitted to the IFRB were approved.[18] An examination of the table shows that there are multiple frequencies available within each frequency band (see § 80.371(b)(2), Table B, of the attached Appendix). Above 12 MHz, it is possible to assign a unique channel (non-shared) to each of the five domestic public coast stations currently providing high seas public correspondence. MMR argues, however, that we should make all IFRB approved allotments available for application. We agree to permit access to all duplex channels permitted internationally and have included all IFRB approved allotments in the attached Appendix. This will allow applicants the most flexibility for meeting their operational needs.[19]

15. Further, MMR suggests that the duplex channels currently used for simplex operation in the Mississippi River System revert to duplex operation for only high seas public correspondence.[20] It proposes that the existing frequencies (duplex channels) used on the Mississippi River be replaced with frequencies from the shared 4/8 MHz spectrum and the new 12-26 MHz simplex frequencies.[21] To do this, MMR suggests that the proposed provisions for the new 4 MHz shared spectrum (4000-4063 kHz) be expanded to include simplex operations.[22]

16. We have reviewed the request with regard to the replacement frequencies for the Mississippi River System. The 4/8 MHz spectrum is not readily available for use as substitute spectrum because it is shared with government users. As indicated in the *Notice*, this spectrum is used extensively by the government fixed services. Therefore, there may not be frequencies available where they are needed and the use of these frequencies may be limited. Thus, considering the need to conclude this proceeding as

quickly as possible, we will proceed with the 4, 6, and 8 MHz substitutions as proposed in the *Notice*. Further, we are making the 4 MHz shared spectrum (4000-4063 kHz) available for simplex use, as suggested by MMR. This is consistent with our proposal to deviate from international provisions and permit the 4 MHz band to be used by coast stations.[23] This change will enable us to explore more fully substitute frequencies for the Mississippi River System from the 4/8 MHz shared spectrum at another time.[24]

17. With regard to the new 12-26 MHz simplex frequencies, we agree with MMR that they are readily available and can be used to replace the four existing frequencies between 12 MHz and 17 MHz that are assigned for use on the Mississippi River System. Thus, we are making these substitutions in the table of Mississippi River Working Frequencies in 47 C.F.R. § 80.371(d).[25] MMR supported making the eighteen remaining frequencies available for public correspondence.[26] Because of the lack of specific comments on the use of the 12-26 MHz simplex frequencies for public correspondence, however, we have decided to allocate four of these simplex frequencies (*i.e.*, two 18 MHz and two 25 MHz frequencies) to 47 C.F.R. § 80.373(c) for business and operational purposes and, as proposed in the *Notice*, the remaining fourteen for public correspondence.[27] Upon further review in consultation with the U.S. Coast Guard, we believe that this will provide private mariners, such as fishing vessels and deep sea yachts, with channels in each available HF band. This would be beneficial for effective communications on the high seas, especially during periods of high sun-spot activity when these bands can be used for communications.

18. *Miscellaneous*. MMR requests that the Commission begin accepting applications for new frequencies 30 days after the issuance of this *Report and Order* rather than waiting until after July 1, 1991, as proposed.[28] It notes that stations licensed by other countries that are able to operate on the new frequencies effective July 1, 1991, may develop a "following" for handling maritime traffic. MMR argues that delaying the application process until after July 1, 1991, would put United States stations at a competitive disadvantage because they would need to make in-roads against established traffic patterns. We agree that the availability of these frequencies for assignment is essential to worldwide competition. Consequently, we will accept applications as of March 1, 1991, (*i.e.*, approximately 30 days after publication of this Report and Order in the Federal Register). Operation on these new frequencies, however, may not be begin until July 1, 1991, in accordance with international provisions.

19. In the *Notice*, we proposed that public coast station applicants for manual Morse code telegraphy, radiotelephony, and the shared 4/8 MHz frequencies provide a justification of their need for additional frequencies.[29] This justification should include a showing indicating that recent traffic usage exceeds 40 percent at peak hours. MMR supports this justification requirement. We are adopting the justification requirement as proposed.[30] It will foster efficient use of the available frequencies. Further, this showing will prevent frequency hording and allow an effective means to distribute the new duplex channels for radiotelephony adopted herein for public correspondence (see discussion above).[31] This requirement should not be burdensome on public coast stations licensees because, as common carriers, they already maintain records on traffic for billing purposes and must file tariffs with the Commission for the communication services provided.

20. In the *Notice*, we also proposed that the new frequencies for Morse code telegraphy at 26 MHz automatically be added to licenses upon renewal. MMR opposed this and suggested that we should require applications.[32] This point is moot because we have amended 47 C.F.R. § 80.357(b) to specify the available bands, including the 26 MHz Morse code telegraphy spectrum, rather than the discrete frequencies as proposed in the *Notice* (see discussion para. 7). Consequently, these frequencies must be applied for and coordinated with the government through the Frequency Assignment Subcommittee of the Interdepartment Radio Advisory Committee (IRAC).

IV. CONCLUSION

21. Adoption of the amendments to the Commission's Rules will bring the U.S. into conformance with the international provisions without delay and, therefore, is in the public interest. By taking this action now, we will give all parties the longest possible time to effect the necessary changes. We note, however, that the United States Senate has not provided its advice and consent to ratification of the Final Acts of the 1987 Mobile WARC. Should any provision of the Final Acts not be ratified as written, further amendments of the Rules may be required.[33]

V. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

22. In accordance with Section 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), our final analysis of the economic impact of these amendments to small entities is as follows:

A. *Need and purpose of this action*: The amendments contained herein incorporate into the Commission's Rules the international revisions to the exclusive maritime mobile HF bands (4000-27500 kHz) adopted by the 1987 Mobile WARC. Because of the global range of HF band frequencies, all HF maritime stations must change frequency at the same time to avoid worldwide interference. The changes are needed to ensure that the maritime stations in the United States meet the new international requirements in a timely manner. Failure to implement the changes would put the United States merchant vessels at a competitive disadvantage to other nations and could adversely affect communications related to safety of life and property at sea.

B. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis*: The Initial Regulatory Flexibility Analysis (Initial Analysis) estimated that over 40,000 licensed ship and coast stations operating in the HF bands would need to change frequencies at 0001 hours UTC on July 1, 1991. The impact of this requirement should be minimal for synthesized transmitters or receivers which can simply be reprogrammed. The crystals in crystal-tuned transmitters or receivers, however, must be replaced. The Initial Analysis estimated that between 2,000-4,000 licensed ship and coast HF stations are crystal-tuned and that the cost to re-fit each of them with new crystals should not exceed $100 per set. One commenter, MMR, licensee of public coast station WLO, indicated that re-fitting its transmitters

and receivers with new crystals would cost hundreds of dollars.[34] We receive no other comments on this point. Because the smaller entities are more likely to use synthesized transmitters/receivers, we continue to believe that the economic impact on small entities should not be severe.

C. *Significant alternatives considered and rejected*: Because of the global range of HF frequencies, all countries of the world must change frequencies at the same time to conduct maritime communications. Further, these frequency changes are necessary to update the distress and safety system in the maritime mobile service.[35] After weighing all aspects of this proceeding, we have concluded that the amendments adopted herein represent the most reasonable and least burdensome course of action to ensure compliance with international provisions.

VI. PAPERWORK REDUCTION ACT STATEMENT

23. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information requirement on the public. The Office of Management and Budget (OMB) has approved the collection of information contained in these rules. The collection requirement is reported in the Application for Land Radio Station License in the Maritime Service (FCC Form 503). The OMB control number for this collection of information requirement is No. 3060-0089.

VII. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that Parts 2 and 80 of the Commission's Rules ARE AMENDED as set forth in the Appendix below.

25. IT IS FURTHER ORDERED that, consistent with the Final Acts of the World Administrative Radio Conference for Mobile Services, Geneva, 1987, this *Report and Order* is effective at 0001 hours UTC on July 1, 1991.

26. IT IS FURTHER ORDERED that a copy of this *Report and Order* be sent to the Chief Counsel for Advocacy of the Small Business Administration.

27. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The 1987 Mobile WARC, held in Geneva from September 14 to October 17, 1987, was broad in scope. Its changes are being implemented through three rule making proceedings. The first proceeding addressed changes to the Table of Frequency Allocations and certain maritime requirements that entered into force on October 3, 1989. *See* Report and Order, GEN Docket No. 89-103, adopted September 19, 1989, 4 FCC Rcd 7603 (1989). This, the second rule making proceeding, addresses those revisions that pertain to the maritime mobile HF bands. *See* Notice of Proposed Rule Making, PR Docket No. 90-133, adopted March 8, 1990, 5 FCC Rcd 1838 (1990). The final proceeding will implement the Global Maritime Distress and Safety System (GMDSS) into the maritime mobile service rules. *See* Notice of Proposed Rule Making, PR Docket No. 90-480, adopted October 11, 1990, 5 FCC Rcd 6212 (1990).

[2] DSC and NBDP are modern techniques for conducting radiocommunications. DSC is a system used to establish contact with a station or group of stations automatically by means of radio. DSC essentially provides direct dialing capability to the maritime community for conducting voice communications. NBDP is a system used to provide telex (printed) messages automatically by means of radio. NBDP provides a method of delivering printed material automatically to a particular station or group of stations. The technical characteristics of these systems are prescribed by the International Radio Consultative Committee (CCIR).

[3] Notice of Proposed Rule Making, PR Docket No. 90-133, 5 FCC Rcd 1838 (1990).

[4] *Notice* at para. 8.

[5] In the *Notice*, we proposed 11 discrete frequencies spaced 400 Hz apart for coast stations; this results in 4.4 kilohertz of spectrum. We stated that 11 frequencies should be sufficient because there are only 14 public coast stations currently using Morse code telegraphy and the 26 MHz band has limited operational use due to propagation conditions. *Notice* at para. 9.

[6] MMR comments at 3-4.

[7] MMR comments at 4.

[8] MMR comments at 5-6.

[9] MMR also indicates that a substitute frequency is needed for coast station frequency 22320 kHz in the Gulf of Mexico. MMR comments at 5. Our records indicate that this frequency is indeed licensed to WLO, Mobile, Alabama. Accordingly, the substitute frequency, 22570.5 kHz, will be added to the Rules as requested.

[10] This flexibility will allow the coordination of assignments as noted by MMR (*i.e.*, 500 Hz channel with 1-2 kilohertz spacing) depending upon government requirements and international notifications.

[11] *Notice* at para. 8.

[12] In the *Notice*, we stated that "[b]ecause there are no 18 MHz band frequencies available for ship station Morse code telegraphy that would correspond with the 19 MHz band coast frequencies, we propose to add frequencies for coast station Morse code telegraphy at 26 MHz only." *Notice* at para. 9 and MMR comments at 3.

[13] *Notice* at para. 11.

[14] MMR comments at 10-11.

[15] Rockwell comments at 1.

[16] Rockwell comments at 2.

[17] MMR comments at 19.

[18] On September 28, 1990, the IFRB issued the initial allotment plan (IFRB Circular-letter No. 836). Of the 315 allotments requested (35 channels at 9 locations), 250 allotments were accepted. No changes to United States allotments are expected to the final allotment plan which will be issued by the IFRB for implementation on July 1, 1991.

[19] During the application process, applicants should request channels to minimize interference. The Commission's staff, however, will review the channel requested and may substitute another channel from the same MHz band.

[20] Certain duplex radiotelephone channels have been split and their frequencies are assigned on a simplex basis to four inland coast stations to provide adequate communications on the inland waterways. In some instances, the frequencies are used also in the duplex mode for public correspondence on the high seas.

[21] Frequencies in the 4000-4063 kHz and 8100-8195 kHz bands are shared on a co-primary basis between the fixed and maritime mobile services (shared 4/8 MHz spectrum). Additionally, the 1987 Mobile WARC allocated an additional eighteen radiotelephony frequencies between 12 MHz and 26 MHz for simplex operations (12-26 MHz simplex frequencies). In the *Notice*, we proposed to make the shared 4/8 MHz spectrum and the 12-26 MHz simplex frequencies available for public correspondence. *Notice* at paras. 13 and 15.

[22] MMR comments at 15.

[23] Internationally, the 4 MHz frequencies are limited to ship stations (*see* Radio Regulation No. 517). Individual countries, however, may deviate from international provisions so long as harmful interference is not caused to services carried out by other administrations in accordance with international regulations (*see* Radio Regulation No. 342). In the *Notice*, we stated that coast station operation is possible without interference to other administrations because of the limited range of frequencies in the 4 MHz and 8 MHz bands. *Notice* at para. 15. MMR supports this proposal and suggests that simplex operations be allowed between 4000-4063 MHz, similar to the provisions between 8100-8195 MHz. MMR comments at 15.

[24] Further documentation of the requirements of the Mississippi River System and the high seas public correspondence service, especially in view of the additional channels for duplex service adopted herein, is needed before we pursue coordination of these frequencies that are shared with the fixed services.

[25] Channels 1202 and 1620 revert to high seas public correspondence use only. They are currently assigned to high seas public coast stations KMI, Dixon, California, and WOO, Ocean Gate, New Jersey, respectively.

[26] MMR notes that, although these frequencies are not protected internationally, they could be used for special purpose services tailored to specific customers or markets. MMR further suggests that the Commission recognize that there may be non-voice emissions, *e.g.*, data, that would be appropriate for these frequencies. MMR comments at 15. Use of these simplex radiotelephony frequencies for non-voice emissions, however, would be in contravention to the Radio Regulations. As pointed out in the *Notice*, these simplex frequencies would be shared with the U.S. government and the international community. Existing simplex frequencies are used extensively by the U.S. government and foreign vessels. Because they are shared worldwide, there exists a potential for substantial interference among users. Allowing these frequencies to be used for data transmissions would add to this interference potential. Consequently, we decline to permit these simplex frequencies to be used for non-voice emissions.

[27] These simplex radiotelephony frequencies are considered "common use" frequencies under the international Radio Regulations. As such, these simplex frequencies, unlike the duplex frequencies, would not be protected internationally. They cannot be notified for inclusion in the Master International Frequency Register which provides stations with interference protection. These frequencies can be listed in the international List of Coast Stations but this document offers no interference protection. *See* Radio Regulation No. 1220 and Recommendation 304.

[28] MMR comments at 19.

[29] *Notice* at para. 19.

[30] Public coast station applications that are submitted on or after March 1, 1991, in accordance with this Report and Order, must include a justification of need. *See* discussion above.

[31] Applicants for the new duplex channels for radiotelephony would need to include this justification for each frequency band requested. Because a record of a two month period is necessary for the justification, only one channel per frequency band may be processed at a time. Inherently, this application process will permit the assignment of the new frequencies only to those that can demonstrate a need based on traffic.

[32] MMR comments at 20-21.

[33] We foresee little difficulty with this approach but caution that we may have to re-evaluate these revisions if consent by the United States Senate requires modifications. The benefits gained by implementation in accordance with the international dates, however, outweigh the possibility that further changes might be necessary.

[34] MMR comments at 17.

[35] The Global Maritime Distress and Safety System (GMDSS) will improve distress and safety communications worldwide. It will be phased in internationally from 1992 to 1999. GMDSS will replace the present maritime distress and safety system which relies on ship-to-ship distress alerting using manual Morse code. It will provide a new standard of safety for seafarers worldwide. The GMDSS will rely primarily on ship-to-shore distress alerting using satellites and improved HF terrestrial systems employing automated digital communications techniques.

A P P E N D I X

Parts 2 and 80 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

2. Section 2.106 is amended by removing Footnote 523 in its entirety and by revising the Table of Frequency Allocations and subsequent Footnotes in the appropriate positions to read as follows:

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*		*	*		*
4 000 - 4 063			4 000 - 4 438	4 000 - 4 438		
* * *			MARITIME MOBILE	MARITIME MOBILE	* * *	
			500A 500B 520 520B	500A 500B 520 520B		
4 063 - 4 438						
MARITIME MOBILE 500A 500B 520 520A 520B						
518 519			US82 US236 US296	US82 US236 US296		
*	*		*	*		*
6 200 - 6 525			6 200 - 6525	6 200 - 6 525		
MARITIME MOBILE 500A 500B 520 520B			MARITIME MOBILE	MARITIME MOBILE	* * *	
			500A 500B 520 520B	500A 500B 520 520B		
522			US82 US296	US82 US296		
*	*		*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
8 100 - 8 195			8 100 - 8 815	8 100 - 8 815		
* * *			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	* * *	
8 195 - 8 815						
MARITIME MOBILE 500A 500B 520B 529A						
501			501 US82 US236 US296	501 US82 US236 US296		
*	*		*	*		*
12 230 - 13 200			12 230 - 13 200	12 230 - 13 200		
MARITIME MOBILE 500A 500B 520B 529A			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	* * *	
532			US82 US296	US82 US296		
*	*		*	*		*
16 360 - 17 410			16 360 - 17 410	16 360 - 17 410		
MARITIME MOBILE 500A 500B 520B 529A			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	MARITIME (80)	
532			US82 US296	US82 US296		
*	*		*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
18 168 - 18 780			18 168 - 18 780	18 168 - 18 780		
	FIXED Mobile except aeronautical mobile		FIXED Mobile	FIXED Mobile	* * *	
18 780 - 18 900			18 780 - 18 900	18 780 - 18 900		
	MARITIME MOBILE 532		MARITIME MOBILE US82 US296	MARITIME MOBILE US82 US296	* * *	
*	*		*	*		*
19 680 - 19 800			19 680 - 19 800	19 680 - 19 800		
	MARITIME MOBILE 520B 532		MARITIME MOBILE 520B	MARITIME MOBILE 520B	* * *	
*	*		*	*		*
22 000 - 22 855			22 000 - 22 855	22 000 - 22 855		
	MARITIME MOBILE 520B 532 540		MARITIME MOBILE 520B US82 US296	MARITIME MOBILE 520B US82 US296	* * *	
*	*		*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
25 070 - 25 210			25 070 - 25 210	25 070 - 25 210		
MARITIME MOBILE			MARITIME MOBILE	MARITIME MOBILE	* * *	
544			US82 US281 US296	US82 US281 US296 NG112		
*	*		*	*		*
26 100 - 26 175			26 100 - 26 175	26 100 - 26 175		
MARITIME MOBILE 520B			MARITIME MOBILE 520B	MARITIME MOBILE 520B	* * *	
544						
*	*		*	*		*

500 The carrier frequency 2182 kHz is an international distress and calling frequency for radiotelephony. The conditions for the use of the band 2173.5-2190.5 kHz are prescribed in Articles 37, 38, N 38, and 60.

500A The frequencies 2187.5 kHz, 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, and 16804.5 kHz are international distress frequencies for digital selective calling. The conditions for the use of these frequencies are prescribed in Article N 38.

500B The frequencies 2174.5 kHz, 4177.5 kHz, 6268 kHz, 8376.5 kHz, 12520 kHz, and 16695 kHz are international distress frequencies for narrow-band direct-printing telegraphy. The conditions for the use of these frequencies are prescribed in Article N 38.

501 The carrier frequencies 2182 kHz, 3023 kHz, 5680 kHz, 8364 kHz and the frequencies 121.5 MHz, 156.8 MHz and 243 MHz may also be used, in accordance with the procedures in force for terrestrial radiocommunication services, for search and rescue operations concerning manned space vehicles. The conditions for the use of the frequencies are prescribed in Articles 38 and N 38. The same applies to the frequencies 10003 kHz, 14993 kHz and 19993 kHz, but in each of these cases emissions must be confined in a band of $\pm$ 3 kHz about the frequency.

505 The carrier (reference) frequencies 3023 kHz and 5680 kHz may also be used, in accordance with Articles 38 and N 38 by stations of the maritime mobile service engaged in coordinated search and rescue operations.

517 The use of the band 4000-4063 kHz by the maritime mobile service is limited to ship stations using radiotelephony (see No. 4374 and Appendix 16).

520 The conditions for the use of the carrier frequencies 4125 kHz and 6215 kHz are prescribed in Article 37, 38, N 38 and 60.

520A The frequency 4209.5 kHz is used exclusively for the transmission by coast stations of meteorological and navigational warnings and urgent information to ships by means of narrow-band direct-printing techniques (see Resolution 332 (Mob-87)).

520B The frequencies 4210 kHz, 6314 kHz, 8416.5 kHz, 12579 kHz, 16806.5 kHz, 19680.5 kHz, 22376 kHz, and 26100.5 kHz are the international frequencies for the transmission of Maritime Safety Information (MSI) (see Resolution 333 (Mob-87) and Appendix 31).

529A The conditions for the use of the carrier frequency 8291 kHz, 12290 kHz, and 16420 kHz are prescribed in Articles 38, N 38 and 60.

US296 Until July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4160.6, 4168, 6238.6, 6242.6, 8326, 8341.5, 12485, 12489, 16654, 16658, 22186 and 22190 kHz. Effective July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4154.5, 4169.5, 6235.5, 6259.5, 8302.5, 8338.5, 12370.5, 12418.5, 16551.5, 16614.5, 18847.5, 18868.5, 22181.5, 22238.5, 25123.5, and 25159.5 kHz.

3. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. In Section 80.355, paragraph (c)(2) is amended by revising it in its entirety to read as follows:

§ 80.355 Distress, urgency, safety, call and reply Morse code frequencies.

* * * * *

(c) * * *

(2) Ship station frequencies. The following table describes the calling frequencies in the 4000-27500 kHz band which are available for use by authorized ship stations equipped with crystal controlled oscillators for A1A or J2A radiotelegraphy. There are two series of frequencies for each geographic region. Ship stations with synthesized transmitters may operate on every full 100 Hz increment in the 0.5 kHz channel for the frequencies listed, except for 100 Hz above and below those designated for worldwide use. During normal business hours when not communicating on other frequencies, all U.S. coast radiotelegraph stations must monitor the worldwide frequencies and the initial calling frequencies for the region in which it is located. The specific frequencies which must be monitored by a coast station will vary with propagation conditions. The calling frequencies which are routinely monitored by specific coast stations can be determined by reference to the ITU publication entitled "List of Coast Stations". Initial calls by ship stations must be made on the appropriate initial calling frequency first. Calls on the worldwide frequencies may be made only after calls on the appropriate initial calling frequency are unsuccessful.

Region	ITU	Ship Morse calling frequencies (kHz)						ITU	
Worldwide	3	4184.0	6276.0	8368.0	12552.0	16736.0	22280.5	C	25172.0
	4	4184.5	6276.5	8369.0	12553.5	16738.0	22281.0	C	25172.0
Atlantic									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Caribbean									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Gulf-Mexico									
initial	5	4183.0	6278.0	8367.0	12551.0	16735.0	22281.5	A	25171.5
alternate	6	4183.5	6278.5	8367.5	12551.5	16735.5	22282.0	A	25171.5
N Pacific									
initial	7	4185.0	6279.0	8368.5	12552.5	16736.5	22282.5	B	25172.5
alternate	8	4185.5	6279.5	8369.5	12553.0	16737.0	22283.0	B	25172.5
S Pacific									
initial	9	4186.0	6280.0	8370.0	12554.0	16737.5	22283.5	B	25172.5
alternate	10	4186.5	6280.5	8370.5	12554.5	16738.5	22284.0	B	25172.5

* * * * *

5. Section 80.357 is amended by revising paragraph (a)(3) in its entirety, by revising the text of paragraph (b)(1) in its entirety, by revising the table numbers listed in columns entitled 16 MHz and 22 MHz of paragraph (b)(1) in their entirety, and by revising paragraph (b)(2)(ii) in its entirety to read as follows:

§ 80.357 Morse code working frequencies.

* * * * *

(a) * * *

(3) Frequencies in the 2000-27500 kHz band. This paragraph describes the working frequencies and Channel Series in the 2000-27500 kHz band which are assignable to ship stations.

(i) Two Channel Series will be assigned for routine use to each ship station. Frequencies from any other Channel Series may be used if the frequencies in the assigned Channel Series are not adequate for communications.

Channel Series	Ship Morse working frequencies (kHz)						
W1	4187.0	6285.0	8342.0	12422.0	16619.0	22242.0	25161.5
			8343.5	12453.0	16650.0	22273.0	
					16681.0		
W2	4187.5	6285.5	8342.5	12422.5	16619.5	22242.5	25162.0
			8344.0	12453.5	16650.5	22273.5	
					16681.5		
W3	4188.0	6286.0	8343.0	12423.0	16620.0	22243.0	25162.5
			8344.5	12454.0	16651.0	22274.0	
					16682.0		
W4	4188.5	6286.5	8343.5	12423.5	16620.5	22243.5	25163.0
			8345.0	12454.5	16651.5	22274.5	
					16682.5		
W5	4189.0	6287.0	8344.0	12424.0	16621.0	22244.0	25163.5
			8345.5	12455.0	16652.0	22275.0	
					16683.0		
W6	4189.5	6287.5	8344.5	12424.5	16621.5	22244.5	25164.0
			8346.0	12455.5	16652.5	22275.5	
					16619.0		
W7	4190.0	6288.0	8345.0	12425.0	16622.0	22245.0	25164.5
			8346.5	12456.0	16653.0	22276.0	
					16619.5		
W8	4190.5	6288.5	8345.5	12425.5	16622.5	22245.5	25165.0
			8347.0	12456.5	16653.5	22276.5	
					16620.0		
W9	4191.0	6289.0	8346.0	12426.0	16623.0	22246.0	25165.5
			8347.5	12457.0	16654.0	22277.0	
					16620.5		

W10	4191.5	6289.5	8346.5	12426.5	16623.5	22246.5	25166.0
			8348.0	12457.5	16654.5	22270.5	
					16621.0		
W11	4192.0	6290.0	8347.0	12427.0	16624.0	22247.0	25166.5
			8348.5	12458.0	16655.0	22278.0	
					16621.5		
W12	4192.5	6290.5	8347.5	12427.5	16624.5	22247.5	25167.0
			8349.0	12458.5	16655.5	22278.5	
					16622.0		
W13	4193.0	6291.0	8348.0	12428.0	16625.0	22248.0	25167.5
			8349.5	12459.0	16656.0	22279.0	
					16622.5		
W14	4193.5	6291.5	8348.5	12428.5	16625.5	22248.5	25168.0
			8350.0	12459.5	16656.5	22242.0	
					16623.0		
W15	4194.0	6292.0	8349.0	12429.0	16626.0	22249.0	25168.5
			8350.5	12460.0	16657.0	22242.5	
					16623.5		
W16	4194.5	6292.5	8349.5	12429.5	16626.5	22249.5	25169.0
			8351.0	12460.5	16657.5	22243.0	
					16624.0		
W17	4195.0	6293.0	8350.0	12430.0	16627.0	22250.0	25169.5
			8351.5	12461.0	16658.0	22243.5	
					16624.5		
W18	4195.5	6293.5	8350.5	12430.5	16627.5	22250.5	25170.0
			8352.0	12461.5	16658.5	22244.0	
					16625.0		
W19	4196.0	6294.0	8351.0	12431.0	16628.0	22251.0	25170.5
			8352.5	12462.0	16659.0	22244.5	
					16625.5		
W20	4196.5	6294.5	8351.5	12431.5	16628.5	22251.5	25171.0
			8353.0	12462.5	16659.5	22245.0	
					16626.0		
W21	4197.0	6295.0	8352.0	12432.0	16629.0	22252.0	25161.5
			8353.5	12463.0	16660.0	22245.5	
					16626.5		
W22	4197.5	6295.5	8352.5	12432.5	16629.5	22252.5	25162.0
			8354.0	12463.5	16660.5	22246.0	
					16627.0		
W23	4198.0	6296.0	8353.0	12433.0	16630.0	22253.0	25162.5
			8354.5	12464.0	16661.0	22246.5	
					16627.5		
W24	4198.5	6296.5	8353.5	12433.5	16630.5	22253.5	25163.0
			8355.0	12464.5	16661.5	22247.0	
					16628.0		
W25	4199.0	6297.0	8354.0	12434.0	16631.0	22254.0	25163.5
			8355.5	12465.0	16662.0	22247.5	
					16628.5		

W26	4199.5	6297.5	8354.5	12434.5	16631.5	22254.5	25164.0
			8356.0	12465.5	16662.5	22248.0	
					16629.0		
W27	4200.0	6298.0	8355.0	12435.0	16632.0	22255.0	25164.5
			8356.5	12466.0	16663.0	22248.5	
					16629.5		
W28	4200.5	6298.5	8355.5	12435.5	16632.5	22255.5	25165.0
			8357.0	12466.5	16663.5	22249.0	
					16630.0		
W29	4201.0	6299.0	8356.0	12436.0	16633.0	22256.0	25165.5
			8357.5	12467.0	16664.0	22249.5	
					16630.5		
W30	4201.5	6299.5	8356.5	12436.5	16633.5	22256.5	25166.0
			8358.0	12467.5	16664.5	22250.0	
					16631.0		
W31	4202.0	6300.0	8357.0	12437.0	16634.0	22257.0	25166.5
			8358.5	12468.0	16665.0	22250.5	
					16631.5		
W32	4202.0	6300.0	8357.5	12437.5	16634.5	22257.5	25167.0
			8359.0	12468.5	16665.5	22251.0	
					16632.0		
W33	4201.5	6299.5	8358.0	12438.0	16635.0	22256.0	25167.5
			8359.5	12469.0	16666.0	22251.5	
					16632.5		
W34	4201.0	6299.0	8358.5	12438.5	16635.5	22258.5	25168.0
			8360.0	12469.5	16666.5	22252.0	
					16633.0		
W35	4200.5	6298.5	8359.0	12439.0	16636.0	22259.0	25168.5
			8360.5	12470.0	16667.0	22252.5	
					16633.5		
W36	4200.0	6298.0	8359.5	12439.5	16636.5	22259.5	25169.0
			8361.0	12470.5	16667.5	22253.0	
					16634.0		
W37	4199.5	6297.5	8360.0	12440.0	16637.0	22260.0	25169.5
			8361.5	12471.0	16668.0	22253.5	
					16634.5		
W38	4199.0	6297.0	8360.5	12440.5	16637.5	22260.5	25170.0
			8362.0	12471.5	16668.5	22254.0	
					16635.0		
W39	4198.5	6296.5	8361.0	12441.0	16638.0	22261.0	25170.5
			8362.5	12472.0	16669.0	22254.5	
					16635.5		
W40	4198.0	6296.0	8361.5	12441.5	16638.5	22261.5	25171.0
			8363.0	12472.5	16669.5	22255.0	
					16636.0		
W41	4197.5	6295.5	8362.0	12442.0	16639.0	22262.0	25161.5
			8363.5	12473.0	16670.0	22255.5	
					16636.5		

W42	4197.0	6295.0	8362.5	12442.5	16639.5	22262.5	25162.0
			8364.0	12473.5	16670.5	22256.0	
					16637.0		
W43	4196.5	6294.5	8363.0	12443.0	16640.0	22263.0	25162.5
			8364.5	12474.0	16671.0	22256.5	
					16637.5		
W44	4196.0	6294.0	8363.5	12443.5	16640.5	22263.5	25163.0
			8365.0	12474.5	16671.5	22257.0	
					16638.0		
W45	4195.5	6293.5	8364.0	12444.0	16641.0	22264.0	25163.5
			8365.5	12475.0	16672.0	22257.5	
					16638.5		
W46	4195.0	6293.0	8364.5	12444.5	16641.5	22264.5	25164.0
			8371.0	12475.5	16672.5	22258.0	
					16639.0		
W47	4194.5	6292.5	8365.0	12445.0	16642.0	22265.0	25164.5
			8371.5	12476.0	16673.0	22258.5	
					16639.5		
W48	4194.0	6292.0	8365.5	12445.5	16642.5	22265.5	25165.0
			8372.0	12476.5	16673.5	22259.0	
					16640.0		
W49	4193.5	6291.5	8371.0	12446.0	16643.0	22266.0	25165.5
			8372.5	12422.0	16674.0	22259.5	
					16640.5		
W50	4193.0	6291.0	8371.5	12446.5	16643.5	22266.5	25166.0
			8373.0	12422.5	16674.5	22260.0	
					16641.0		
W51	4192.5	6290.5	8372.0	12447.0	16644.0	22267.0	25166.5
			8373.5	12423.0	16675.0	22260.5	
					16641.5		
W52	4192.0	6290.0	8372.5	12447.5	16644.5	22267.5	25167.0
			8374.0	12423.5	16675.5	22261.0	
					16642.0		
W53	4191.5	6289.5	8373.0	12448.0	16645.0	22268.0	25167.5
			8374.5	12424.0	16676.0	22261.5	
					16642.5		
W54	4191.0	6289.0	8373.5	12448.5	16645.5	22268.5	25168.0
			8375.0	12424.5	16676.5	22262.0	
					16643.0		
W55	4190.5	6288.5	8374.0	12449.0	16646.0	22269.0	25168.5
			8375.5	12425.0	16677.0	22262.5	
					16643.5		
W56	4190.0	6288.0	8374.5	12449.5	16646.5	22269.5	25169.0
			8376.0	12425.5	16677.5	22263.0	
					16644.0		
W57	4189.5	6287.5	8375.0	12450.0	16647.0	22270.0	25169.5
			8342.0	12426.0	16678.0	22263.5	
					16644.5		

W58	4189.0	6287.0	8375.5	12450.5	16647.5	22270.5	25170.0
			8342.5	12426.5	16678.5	22264.0	
					16645.0		
W59	4188.5	6286.5	8376.0	12451.0	16648.0	22271.0	25170.5
			8343.0	12427.0	16679.0	22264.5	
					16645.5		
W60	4188.0	6286.0	8342.0	12451.5	16648.5	22271.5	25171.0
			8343.5	12427.5	16679.5	22265.0	
					16646.0		
W61	4187.5	6285.5	8342.5	12452.0	16649.0	22272.0	25161.5
			8344.0	12428.0	16680.0	22265.5	
					16646.5		
W62	4187.0	6285.0	8343.0	12452.5	16649.5	22272.5	25162.0
			8344.5	12428.5	16680.5	22266.0	
					16678.0		

(ii) If the frequencies listed in paragraph (3)(i) of this section are not adequate for communications, ship stations may use any of the non-paired narrow-band direct-printing frequencies listed in § 80.361(b) of this part for A1A or J2A radiotelegraphy.

(b) Coast station frequencies.

(1) Frequencies in the 100-27500 kHz band. The following table describes the working carrier frequencies in the 100-27500 kHz band which are assignable to coast stations located in the designated geographical areas. The exclusive maritime mobile HF bands listed in the table contained in § 80.363(b) of this part are also available for assignment to public coast stations for A1A or J2A radiotelegraphy following coordination with government users.

Area	Coast Morse working frequencies (kHz)								
	100-160 kHz	405-525 kHz	2 MHz	4 MHz	6 MHz	8 MHz	12 MHz	16 MHz	22 MHz
Central Pacific..								17016.8	22479.0
								17026.0	22515.0
								17088.8	22557.0
			*	*	*			.....	22675.5
								.....	.....
South Pacific....								17064.8	22467.0
								17088.8	22663.5
								17218.4	.....
								.....	.....
Gulf of Mexico...								17117.6	22467.0
								17170.4	22569.0
								17172.4	22570.5
								17208.8	22681.0
								.....	.....
Great Lakes.....								.....	.....
Hawaii.....								16978.4	22509.0
Puerto Rico.....								.....	.....
North Atlantic...								16933.2	22485.0
								16968.8	22503.0
								16973.6	22521.0
								16997.6	22366.5
								17021.6	22599.0
								17093.6	22657.0
								16904.9	.....
								.....	.....
Central Atlantic.								.....	.....
South Atlantic...								16918.8	22503.0
								17093.6	22569.0
								17160.8	22681.0
								17170.4	.....
								17199.2	.....
								.....	.....
North Pacific....								17007.2	22539.0
Alaska.....								.....	.....

(2) * * *

(i) * * *

(ii) Frequencies above 5 MHz may be assigned primarily to stations serving the high seas and secondarily to stations serving inland waters of the United States, including the Great Lakes, under the condition that interference will not be caused to any coast station serving the high seas. Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(A) a schedule of each currently licensed Morse working frequency and the expected use of the proposed frequencies;

(B) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(C) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

* * * * *

6. Section 80.359 is amended by revising paragraphs (a) and (b) in their entirety to read as follows:

§ 80.359 Frequencies for digital selective calling (DSC).

(a) General purpose calling. The following table describes the calling frequencies for use by authorized ship and coast stations for general purpose DSC. There are three series of paired frequencies. One series is for worldwide use; the other two series are for regional use. The "Series A" designation includes coast stations along, and ship stations in, the Atlantic Ocean, the Gulf of Mexico, and the Caribbean Sea. The "Series B" designation includes stations in any remaining areas. Stations must initiate contact on the appropriate regional frequency depending upon the location of the called station and propagation conditions. Acknowledgement is made on the paired frequency. The worldwide frequencies may be used for international calling, if calls on the appropriate regional frequencies are unsuccessful, or the regional series does not contain the appropriate band (e.g., 2 MHz). During normal working hours, all public coast stations capable of DSC operations must monitor the worldwide and regional frequencies appropriate for its location. The specific frequencies to be monitored will vary with propagation conditions.

General Purpose DSC (in kHz unless otherwise noted)					
Worldwide		Series A		Series B	
Ship	Coast	Ship	Coast	Ship	Coast
458.5	455.5	---	---	---	---
2189.5	2177.0[1]	---	---	---	---
4208.0	4219.5	4208.5	4220.0	4209.0	4220.5
6312.5	6331.0	6313.0	6331.5	6313.5	6332.0
8415.0	8436.5	8415.5	8437.0	8416.0	8437.5
12577.5	12657.0	12578.0	12657.5	12578.5	12658.0
16805.0	16903.0	16805.5	16903.5	16806.0	16904.0
18898.5	19703.5	18899.0	19704.0	18899.5	19704.5
22374.5	22444.0	22375.0	22444.5	22375.5	22445.0
25208.5	26121.0	25209.0	26121.5	25209.5	26122.0
156.525 MHz	156.525 MHz	---	---	---	---

1 The frequency 2177.0 kHz is also available to ship stations for intership calling and acknowledgement of such calls only.

(b) Distress and safety calling. The frequencies 2187.5 kHz, 4207.5 kHz, 6312.0 kHz, 8414.5 kHz. 12577.0 kHz, 16804.5 kHz, and 156.525 MHz may be used for DSC by coast and ship stations on a simplex basis for distress and safety purposes. The provisions and procedures for distress and safety calling are contained in CCIR Recommendation 541 as modified by § 80.103(c) of this part.

* * * * *

7. In Section 80.361, paragraphs (a) and (b) are revised in their entirety and a new paragraph (c) is added to read as follows:

§ 80.361 Frequencies for narrow-band direct-printing (NBDP) and data transmissions.

(a) The following frequencies are available for assignment to public coast stations for narrow-band direct-printing (NBDP) and data transmissions. The paired ship frequencies are available for use by authorized ship stations for NBDP and data transmissions.

Paired frequencies for NBDP and data transmissions (kHz)

Ch. No.	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
1	4210.5	4172.5	6314.5	6263.0	——	——	12579.5	12477.0	16807.0	16683.5	19681.0	18870.5	22376.5	22284.5	26101.0	25173.0
2	4211.0	4173.0	6315.0	6263.5	8417.0	8377.0	12580.0	12477.5	16807.5	16684.0	19681.5	18871.0	22377.0	22285.0	26101.5	25173.5
3	4211.5	4173.5	6315.5	6264.0	8417.5	8377.5	12580.5	12478.0	16808.0	16684.5	19682.0	18871.5	22377.5	22285.5	26102.0	25174.0
4	4212.0	4174.0	6316.0	6264.5	8418.0	8378.0	12581.0	12478.5	16808.5	16685.0	19682.5	18872.0	22378.0	22286.0	26102.5	25174.5
5	4212.5	4174.5	6316.5	6265.0	8418.5	8378.5	12581.5	12479.0	16809.0	16685.5	19683.0	18872.5	22378.5	22286.5	26103.0	25175.0
6	4213.0	4175.0	6317.0	6265.5	8419.0	8379.0	12582.0	12479.5	16809.5	16686.0	19683.5	18873.0	22379.0	22287.0	26103.5	25175.5
7	4213.5	4175.5	6317.5	6266.0	8419.5	8379.5	12582.5	12480.0	16810.0	16686.5	19684.0	18873.5	22379.5	22287.5	26104.0	25176.0
8	4214.0	4176.0	6318.0	6266.5	8420.0	8380.0	12583.0	12480.5	16810.5	16687.0	19684.5	18874.0	22380.0	22288.0	26104.5	25176.5
9	4214.5	4176.5	6318.5	6267.0	8420.5	8380.5	12583.5	12481.0	16811.0	16687.5	19685.0	18874.5	22380.5	22288.5	26105.0	25177.0
10	4215.0	4177.0	6319.0	6267.5	8421.0	8381.0	12584.0	12481.5	16811.5	16688.0	19685.5	18875.0	22381.0	22289.0	26105.5	25177.5
11	——	——	——	——	8421.5	8381.5	12584.5	12482.0	16812.0	16688.5	19686.0	18875.5	22381.5	22289.5	26106.0	25178.0
12	4215.5	4178.0	6319.5	6268.5	8422.0	8382.0	12585.0	12482.5	16812.5	16689.0	19686.5	18876.0	22382.0	22290.0	26106.5	25178.5
13	4216.0	4178.5	6320.0	6269.0	8422.5	8382.5	12585.5	12483.0	16813.0	16689.5	19687.0	18876.5	22382.5	22290.5	26107.0	25179.0
14	4216.5	4179.0	6320.5	6269.5	8423.0	8383.0	12586.0	12483.5	16813.5	16690.0	19687.5	18877.0	22383.0	22291.0	26107.5	25179.5
15	4217.0	4179.5	6321.0	6270.0	8423.5	8383.5	12586.5	12484.0	16814.0	16690.5	19688.0	18877.5	22383.5	22291.5	26108.0	25180.0
16	4217.5	4180.0	6321.5	6270.5	8424.0	8384.0	12587.0	12484.5	16814.5	16691.0	19688.5	18878.0	22384.0	22292.0	26108.5	25180.5
17	4218.0	4180.5	6322.0	6271.0	8424.5	8384.5	12587.5	12485.0	16815.0	16691.5	19689.0	18878.5	22384.5	22292.5	26109.0	25181.0
18			6322.5	6271.5	8425.0	8385.0	12588.0	12485.5	16815.5	16692.0	19689.5	18879.0	22385.0	22293.0	26109.5	25181.5
19			6323.0	6272.0	8425.5	8385.5	12588.5	12486.0	16816.0	16692.5	19690.0	18879.5	22385.5	22293.5	26110.0	25182.0
20			6323.5	6272.5	8426.0	8386.0	12589.0	12486.5	16816.5	16693.0	19690.5	18880.0	22386.0	22294.0	26110.5	25182.5
21			6324.0	6273.0	8426.5	8386.5	12589.5	12487.0	16817.0	16693.5	19691.0	18880.5	22386.5	22294.5		
22			6324.5	6273.5	8427.0	8387.0	12590.0	12487.5	16817.5	16694.0	19691.5	18881.0	22387.0	22295.0		
23			6325.0	6274.0	8427.5	8387.5	12590.5	12488.0	16818.0	16694.5			22387.5	22295.5		
24			6325.5	6274.5	8428.0	8388.0	12591.0	12488.5	——	——			22388.0	22296.0		
25			6326.0	6275.0	8428.5	8388.5	12591.5	12489.0	16818.5	16695.5			22388.5	22296.5		
26			6326.5	6275.5	8429.0	8389.0	12592.0	12489.5	16819.0	16696.0			22389.0	22297.0		
27			6327.0	6281.0	8429.5	8389.5	12592.5	12490.0	16819.5	16696.5			22389.5	22297.5		
28			6327.5	6281.5	8430.0	8390.0	12593.0	12490.5	16820.0	16697.0			22390.0	22298.0		
29			6328.0	6282.0	8430.5	8390.5	12593.5	12491.0	16820.5	16697.5			22390.5	22298.5		
30					8431.0	8391.0	12594.0	12491.5	16821.0	16698.0			22391.0	22299.0		
31					8431.5	8391.5	12594.5	12492.0	16821.5	16698.5			22391.5	22299.5		
32					8432.0	8392.0	12595.0	12492.5	16822.0	16699.0			22392.0	22300.0		
33					8432.5	8392.5	12595.5	12493.0	16822.5	16699.5			22392.5	22300.5		
34					8433.0	8393.0	12596.0	12493.5	16823.0	16700.0			22393.0	22301.0		

	Paired frequencies for NBDP and data transmissions (kHz)																			
Ch.	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
No.	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
35							12596.5	12494.0	16823.5	16700.5			22393.5	22301.5		
36							12597.0	12494.5	16824.0	16701.0			22394.0	22302.0		
37							12597.5	12495.0	16824.5	16701.5			22394.5	22302.5		
38							12598.0	12495.5	16825.0	16702.0			22395.0	22303.0		
39							12598.5	12496.0	16825.5	16702.5			22395.5	22303.5		
40							12599.0	12496.5	16826.0	16703.0			22396.0	22304.0		
41							12599.5	12497.0	16826.5	16703.5			22396.5	22304.5		
42							12600.0	12497.5	16827.0	16704.0			22397.0	22305.0		
43							12600.5	12498.0	16827.5	16704.5			22397.5	22305.5		
44							12601.0	12498.5	16828.0	16705.0			22398.0	22306.0		
45							12601.5	12499.0	16828.5	16705.5			22398.5	22306.5		
46							12602.0	12499.5	16829.0	16706.0			22399.0	22307.0		
47							12602.5	12500.0	16829.5	16706.5			22399.5	22307.5		
48							12603.0	12500.5	16830.0	16707.0			22400.0	22308.0		
49							12603.5	12501.0	16830.5	16707.5			22400.5	22308.5		
50							12604.0	12501.5	16831.0	16708.0			22401.0	22309.0		
51							12604.5	12502.0	16831.5	16708.5			22401.5	22309.5		
52							12605.0	12502.5	16832.0	16709.0			22402.0	22310.0		
53							12605.5	12503.0	16832.5	16709.5			22402.5	22310.5		
54							12606.0	12503.5	16833.0	16710.0			22403.0	22311.0		
55							12606.5	12504.0	16833.5	16710.5			22403.5	22311.5		
56							12607.0	12504.5	16834.0	16711.0			22404.0	22312.0		
57							12607.5	12505.0	16834.5	16711.5			22404.5	22312.5		
58							12608.0	12505.5	16835.0	16712.0			22405.0	22313.0		
59							12608.5	12506.0	16835.5	16712.5			22405.5	22313.5		
60							12609.0	12506.5	16836.0	16713.0			22406.0	22314.0		
61							12609.5	12507.0	16836.5	16713.5			22406.5	22314.5		
62							12610.0	12507.5	16837.0	16714.0			22407.0	22315.0		
63							12610.5	12508.0	16837.5	16714.5			22407.5	22315.5		
64							12611.0	12508.5	16838.0	16715.0			22408.0	22316.0		
65							12611.5	12509.0	16838.5	16715.5			22408.5	22316.5		
66							12612.0	12509.5	16839.0	16716.0			22409.0	22317.0		
67							12612.5	12510.0	16839.5	16716.5			22409.5	22317.5		
68							12613.0	12510.5	16840.0	16717.0			22410.0	22318.0		
69							12613.5	12511.0	16840.5	16717.5			22410.5	22318.5		
70							12614.0	12511.5	16841.0	16718.0			22411.0	22319.0		

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
71							12614.5	12512.0	16841.5	16718.5			22411.5	22319.5		
72							12615.0	12512.5	16842.0	16719.0			22412.0	22320.0		
73							12615.5	12513.0	16842.5	16719.5			22412.5	22320.5		
74							12616.0	12513.5	16843.0	16720.0			22413.0	22321.0		
75							12616.5	12514.0	16843.5	16720.5			22413.5	22321.5		
76							12617.0	12514.5	16844.0	16721.0			22414.0	22322.0		
77							12617.5	12515.0	16844.5	16721.5			22414.5	22322.5		
78							12618.0	12515.5	16845.0	16722.0			22415.0	22323.0		
79							12618.5	12516.0	16845.5	16722.5			22415.5	22323.5		
80							12619.0	12516.5	16846.0	16723.0			22416.0	22324.0		
81							12619.5	12517.0	16846.5	16723.5			22416.5	22324.5		
82							12620.0	12517.5	16847.0	16724.0			22417.0	22325.0		
83							12620.5	12518.0	16847.5	16724.5			22417.5	22325.5		
84							12621.0	12518.5	16848.0	16725.0			22418.0	22326.0		
85							12621.5	12519.0	16848.5	16725.5			22418.5	22326.5		
86							12622.0	12519.5	16849.0	16726.0			22419.0	22327.0		
87							——	——	16849.5	16726.5			22419.5	22327.5		
88							12622.5	12520.5	16850.0	16727.0			22420.0	22328.0		
89							12623.0	12521.0	16850.5	16727.5			22420.5	22328.5		
90							12623.5	12521.5	16851.0	16728.0			22421.0	22329.0		
91							12624.0	12522.0	16851.5	16728.5			22421.5	22329.5		
92							12624.5	12522.5	16852.0	16729.0			22422.0	22330.0		
93							12625.0	12523.0	16852.5	16729.5			22422.5	22330.5		
94							12625.5	12523.5	16853.0	16730.0			22423.0	22331.0		
95							12626.0	12524.0	16853.5	16730.5			22423.5	22331.5		
96							12626.5	12524.5	16854.0	16731.0			22424.0	22332.0		
97							12627.0	12525.0	16854.5	16731.5			22424.5	22332.5		
98							12627.5	12525.5	16855.0	16732.0			22425.0	22333.0		
99							12628.0	12526.0	16855.5	16732.5			22425.5	22333.5		
100							12628.5	12526.5	16856.0	16733.0			22426.0	22334.0		
101							12629.0	12527.0	16856.5	16733.5			22426.5	22334.5		
102							12629.5	12527.5	16857.0	16739.0						
103							12630.0	12528.0	16857.5	16739.5						
104							12630.5	12528.5	16858.0	16740.0						
105							12631.0	12529.0	16858.5	16740.5						
106							12631.5	12529.5	16859.0	16741.0						
107							12632.0	12530.0	16859.5	16741.5						

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)													
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
108									16860.0	16742.0						
109									16860.5	16742.5						
110									16861.0	16743.0						
111									16861.5	16743.5						
112									16862.0	16744.0						
113									16862.5	16744.5						
114									16863.0	16745.0						
115									16863.5	16745.5						
116									16864.0	16746.0						
117									16864.5	16746.5						
118									16865.0	16747.0						
119									16865.5	16747.5						
120									16866.0	16748.0						
121									16866.5	16748.5						
122									16867.0	16749.0						
123									16867.5	16749.5						
124									16868.0	16750.0						
125									16868.5	16750.5						
126									16869.0	16751.0						
127									16869.5	16751.5						
128									16870.0	16752.0						
129									16870.5	16752.5						
130									16871.0	16753.0						
131									16871.5	16753.5						
132									16872.0	16754.0						

(1) Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed NBDP frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) The following frequencies are available for use by authorized ship stations for NBDP and data transmissions with public coast stations. Public coast stations may receive only on these frequencies.

Ch. Ser.	Non-Paired NBDP Channels (kHz)							
1	4202.5	6300.5	8396.5	12560.0	16785.0	18893.0	22352.0	25193.0
2	4203.0	6301.0	8397.0	12560.5	16785.5	18893.5	22352.5	25193.5
3	4203.5	6301.5	8397.5	12561.0	16786.0	18894.0	22353.0	25194.0
4	4204.0	6302.0	8398.0	12561.5	16786.5	18894.5	22353.5	25194.5
5	4204.5	6302.5	8398.5	12562.0	16787.0	18895.0	22354.0	25195.0
6	4205.0	6303.0	8399.0	12562.5	16787.5	18895.5	22354.5	25195.5
7	4205.5	6303.5	8399.5	12563.0	16788.0	18896.0	22355.0	25196.0
8	4206.0	6304.0	8400.0	12563.5	16788.5	18896.5	22355.5	25196.5
9	4206.5	6304.5	8400.5	12564.0	16789.0	18897.0	22356.0	25197.0
10	4207.0	6305.0	8401.0	12564.5	16789.5	18897.5	22356.5	25197.5
11		6305.5	8401.5	12565.0	16790.0	18898.0	22357.0	25198.0
12		6306.0	8402.0	12565.5	16790.5		22357.5	25198.5
13		6306.5	8402.5	12566.0	16791.0		22358.0	25199.0
14		6307.0	8403.0	12566.5	16791.5		22358.5	25199.5
15		6307.5	8403.5	12567.0	16792.0		22359.0	25200.0
16		6308.0	8404.0	12567.5	16792.5		22359.5	25200.5
17		6308.5	8404.5	12568.0	16793.0		22360.0	25201.0
18		6309.0	8405.0	12568.5	16793.5		22360.5	25201.5
19		6309.5	8405.5	12569.0	16794.0		22361.0	25202.0
20		6310.0	8406.0	12569.5	16794.5		22361.5	25202.5
21		6310.5	8406.5	12570.0	16795.0		22362.0	25203.0
22		6311.0	8407.0	12570.5	16795.5		22362.5	25203.5
23		6311.5	8407.5	12571.0	16796.0		22363.0	25204.0
24			8408.0	12571.5	16796.5		22363.5	25204.5

25			8408.5	12572.0	16797.0	22364.0	25205.0
26			8409.0	12572.5	16797.5	22364.5	25205.5
27			8409.5	12573.0	16798.0	22365.0	25206.0
28			8410.0	12573.5	16798.5	22365.5	25206.5
29			8410.5	12574.0	16799.0	22366.0	25207.0
30			8411.0	12574.5	16799.5	22366.5	25207.5
31			8411.5	12575.0	16800.0	22367.0	25208.0
32			8412.0	12575.5	16800.5	22367.5	
33			8412.5	12576.0	16801.0	22368.0	
34			8413.0	12576.5	16801.5	22368.5	
35			8413.5		16802.0	22369.0	
36			8414.0		16802.5	22369.5	
37					16803.0	22370.0	
38					16803.5	22370.5	
39					16804.0	22371.0	
40						22371.5	
41						22372.0	
42						22372.5	
43						22373.0	
44						22373.5	
45						22374.0	

(c) Distress and calling. The frequencies 2174.5 kHz, 4177.5 kHz, 6268.0 kHz, 8376.5 kHz, 12520.0 kHz, and 16695.0 kHz may be used for NBDP and data transmissions by coast and ship stations on a simplex basis for distress and safety purposes.

* * * * *

8. In Section 80.363, paragraphs (a) and (b) are revised in their entirety to read as follows:

§ 80.363 Frequencies for facsimile.

* * * * *

(a) Ship station frequencies. The following frequencies are available for use by authorized ship stations for facsimile.

Assignable ship frequencies for facsimile (kHz)								
2070.5	4154.5	6235.5	8302.5	12370.5	16551.5	18847.5	22181.5	25123.5
2072.5	4169.5	6259.5	8338.5	12418.5	16614.5	18868.5	22238.5	25159.5
2074.5								
2076.5								

(b) Coast station frequencies.

The following table describes the exclusive maritime mobile HF frequency bands that are available for assignment to coast stations using 3 kHz channels for facsimile. However, any frequency in the 2000-27500 kHz bands listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services, except for the 4000-4063 kHz and the 8100-8195 kHz bands, is available for assignment to coast stations for facsimile. Frequency assignments are subject to coordination with government users.

Frequency bands for Coast facsimile (kHz)	
4221.0 - 4351.0	16904.5 - 17242.0
6332.5 - 6501.0	19705.0 - 19755.0
8438.0 - 8707.0	22445.5 - 22696.0
12658.5 - 13077.0	26122.5 - 26145.0

9. In Section 80.369, paragraphs (b) and (d) are revised to read as follows:

§ 80.369 Distress, urgency, safety, call and reply frequencies.

* * * * *

(b) The frequencies 4125.0 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz may be used by coast and ship stations on a simplex basis for distress and safety communications. The frequency 4125.0 kHz may also be used for distress and safety communications between aircraft and maritime mobile stations.

* * * * *

(d) In the 4000-27500 kHz band, the following coast frequencies are available for assignment to public coast stations for call and reply communications. The paired ship frequencies are available for use by authorized ship stations.

Call and reply frequency pairs in the 4000-27500 kHz Carrier Frequencies (kHz)		
Channel No.	Ship transmit	Coast transmit
421	4125 [1,2,3]	4417 [1]
606	6215 [2,3]	6516 [1]
821	8255	8779
1221	12290 [3]	13137
1621	16420 [3]	17302
1806	18795	19770
2221	22060	22756
2510	25097	26172

1 The frequencies 4125 kHz, 4417 kHz, and 6516 kHz are also available on a simplex basis for private communications, see § 80.373(c) of this part.

2 The frequencies 4125 kHz and 6215 kHz are also available on a simplex basis to ship and coast stations for call and reply, provided that the peak envelope power does not exceed 1 kW.

3 The frequencies 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz are also available on a simplex basis for distress and safety traffic, see paragraph (b) of this section.

* * * * *

10. In Section 80.371, paragraphs (b) and (d) are revised in their entirety to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(b) Working frequencies in the 4000-25700 kHz band. This paragraph describes the working carrier frequencies in the 4000-27500 kHz band.

(1) The following table specifies the carrier frequencies available for assignment to public coast stations. The paired ship frequencies are available for use by authorized ship stations.

TABLE A - PUBLIC CORRESPONDENCE (DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band

Region	Channel No.	Carrier frequencies (kHz) Ship transmit	Coast transmit
East Coast.....	403	4071.0	4363.0
	410	4092.0	4384.0
	411	4095.0	4387.0
	412	4098.0	4390.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	422	4128.0	4420.0
	423	4131.0	4423.0
	802	8198.0	8722.0
	805	8207.0	8731.0
	808	8216.0	8740.0
	810	8222.0	8746.0
	811	8225.0	8749.0
	814	8234.0	8758.0
	815	8237.0	8761.0
	825	8267.0	8791.0
	826	8270.0	8794.0
	831	8285.0	8809.0
	1203	12236.0	13083.0
	1206	12245.0	13092.0
	1208	12251.0	13098.0
	1209	12254.0	13101.0
	1210	12257.0	13104.0
	1211	12260.0	13107.0
	1215	12272.0	13119.0
	1222	12293.0	13140.0
	1223	12296.0	13143.0
	1228	12311.0	13158.0
	1230	12317.0	13164.0
	1601	16360.0	17242.0

	1605	16372.0	17254.0
	1609	16384.0	17266.0
	1610	16387.0	17269.0
	1611	16390.0	17272.0
	1616	16405.0	17287.0
	1620	16417.0	17299.0
	1626	16435.0	17317.0
	1631	16450.0	17332.0
	2201	22000.0	22696.0
	2205	22012.0	22708.0
	2210	22027.0	22723.0
	2215	22042.0	22738.0
	2216	22045.0	22741.0
	2222	22063.0	22759.0
	2236	22105.0	22801.0
West Coast.....	401	4065.0	4357.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	804	8204.0	8728.0
	809	8219.0	8743.0
	814	8234.0	8758.0
	1201	12230.0	13077.0
	1202	12233.0	13080.0
	1203	12236.0	13083.0
	1229	12314.0	13161.0
	1230	12317.0	13164.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	1624	16429.0	17311.0
	2214	22039.0	22735.0
	2223	22066.0	22762.0
	2228	22081.0	22777.0
	2236	22105.0	22801.0
Gulf Coast.....	404	4074.0	4366.0
	405	4077.0	4369.0
	414	4104.0	4396.0
	419	4119.0	4411.0
	824	8264.0	8788.0
	829	8279.0	8803.0
	830	8282.0	8806.0
	1212	12263.0	13110.0
	1225	12302.0	13149.0
	1226	12305.0	13152.0
	1607	16378.0	17260.0
	1632	16453.0	17335.0
	1641	16480.0	17362.0
	2227	22078.0	22774.0
	2231	22090.0	22786.0
	2237	22108.0	22804.0
Great Lakes.....	405	4077.0	4369.0
	409	4089.0	4381.0
	418	4116.0	4408.0
	826	8270.0	8794.0

Hawaii.....	418	4116.0	4408.0
	808	8216.0	8740.0
	1222	12293.0	13140.0
	1601	16360.0	17242.0
Caribbean.....	604	6209.0	6510.0
	605	6212.0	6513.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	2223	22066.0	22762.0

(2) The following table specifies the additional carrier frequencies available for assignment to public coast stations for public correspondence. The paired ship frequencies are available for use by authorized ship stations. The specific frequency assignment available to public coast stations for a particular geographic area is indicated by an "x" under the appropriate column. Table B is based on the initial Appendix 25 Allotment Arrangement published by the International Frequency Registration Board (IFRB) (see IFRB Circular-letter No. 836, dated September 28, 1990). The allotment areas are in accordance with the "Standard Defined Areas" as identified in the Appendix 25 Planning System and indicated in the Preface to the International Frequency List (IFL) (see IFRB Circular-letter No. 843, dated October 31, 1990).

TABLE B - PUBLIC CORRESPONDENCE (ADDITIONAL DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band
Carrier frequencies (kHz)

Channel	Ship Transmit	Coast Transmit	USA-E	USA-W	USA-S	USA-C	VIR	HWA	ALS	PTR	GUM
427	4143.0	4435.0	x	x	x	x	x	x	x	-	x
428	4060.0	4351.0	x	x	x	x	x	x	x	x	x
607	6218.0	6519.0	x	x	x	x	x	x	x	x	x
836	8113.0	8713.0	x	x	x	x	x	x	x	x	x
837	8128.0	8716.0	x	x	x	x	x	x	x	x	x
1233	12326.0	13173.0	x	x	x	x	x	x	x	x	x
1234	12329.0	13176.0	-	x	x	-	-	x	x	-	x
1235	12332.0	13179.0	x	x	x	x	x	x	x	x	x
1236	12335.0	13182.0	-	x	x	-	-	x	-	-	-
1237	12338.0	13185.0	x	-	x	x	x	-	-	x	-
1642	16483.0	17365.0	x	x	x	x	x	x	x	x	x
1643	16486.0	17368.0	x	x	x	x	x	x	x	x	x
1644	16489.0	17371.0	x	x	x	x	-	x	x	-	x
1645	16492.0	17374.0	x	x	x	x	x	x	x	x	x
1646	16495.0	17377.0	-	x	-	-	-	-	-	-	-
1647	16498.0	17380.0	x	x	x	x	-	x	x	-	x
1648	16501.0	17383.0	-	x	-	x	x	x	x	x	x

1801	18780.0	19755.0	x	x	x	x	x	x	x	x	x
1802	18783.0	19758.0	x	-	x	x	x	-	-	x	-
1803	18786.0	19761.0	x	x	-	x	x	x	x	x	x
1804	18789.0	19764.0	-	x	x	-	-	x	x	-	-
1805	18792.0	19767.0	-	x	-	-	-	x	x	-	-
1807	18798.0	19773.0	x	x	x	x	x	x	x	x	x
1808	18801.0	19776.0	x	x	x	x	x	x	x	x	x
2241	22120.0	22816.0	x	x	x	x	x	x	x	x	x
2242	22123.0	22819.0	x	x	x	x	x	x	x	x	x
2243	22126.0	22822.0	x	x	x	x	x	x	x	x	-
2244	22129.0	22825.0	-	x	-	-	-	x	x	-	-
2245	22132.0	22828.0	-	x	x	-	-	x	x	-	-
2246	22135.0	22831.0	x	x	x	x	-	x	x	-	x
2247	22138.0	22834.0	x	x	x	x	x	x	x	-	x
2501	25070.0	26145.0	x	x	x	x	-	x	x	-	x
2502	25073.0	26148.0	x	x	x	x	x	x	x	x	-
2503	25076.0	26151.0	x	x	x	x	x	x	x	-	-
2504	25079.0	26154.0	x	x	x	x	x	x	x	x	x

(3) The following table specifies the non-paired carrier frequencies that are available for assignment to public coast stations for simplex operations subject to the provisions of paragraph (b)(4) of this section. These frequencies are available for use by authorized ship stations for transmissions to coast stations (simplex operations). Assignments on these frequencies must accept interference. They are shared with government users and are considered "common use" frequencies under the international Radio Regulations. They cannot be notified for inclusion in the Master International Frequency Register, which provides stations with interference protection, but may be listed in the international List of Coast Stations. (See Radio Regulation No. 1220 and Recommendation 304.)

PUBLIC CORRESPONDENCE (SIMPLEX) Non-paired radiotelephony frequencies in the 4000-27500 kHz Band[1] Carrier Frequencies (kHz)			
16537	18825	22174	25100
16540	18828	22177	25103
	18831		25106
	18834		25109
	18837		25112

[1] Coast stations limited to a maximum transmitter power of 1 kW (PEP).

(4) Applicants for these public coast frequencies specified in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed working frequency in the 4000-27500 kHz band and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications;

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable; and

(iv) for simplex frequencies listed in paragraph (b)(3) of this section, an additional showing supporting the use of simplex rather than duplex frequencies for the proposed situation.

* * * * *

(d) Working frequencies in the Mississippi River System. The Mississippi River System includes the Mississippi River and connecting navigable waters other than the Great Lakes. The following simplex frequencies are available for assignment to public coast stations serving the Mississippi River System for radiotelephony communications. These simplex frequencies also are available for use by authorized ship stations within communication service range, whether or not the ship is operating within the confines of the Mississippi River System.

Mississippi River System Working Frequencies Carrier Frequencies (kHz)					
2086[1]	4065	6209	8201	12362	16543
2782	4089	6212	8213	12365	16546
	4116	6510	8725		
	4408	6513	8737		

1 Limited to a maximum transmitter output of 150 watts (PEP).

* * * * *

11. In Section 80.373, paragraphs (c) and (i) are revised in their entirety to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(c) Frequencies in the 2000-27500 kHz bands for business and operational communications.

(1) The following simplex frequencies in the 2000-27500 kHz band are available for assignment to private coast stations for business and operational radiotelephone communications. These simplex frequencies also are available for use by authorized ship stations for business and operational radiotelephone communications.

Business and Operational Frequencies in the 2000-27500 kHz Band Carrier Frequencies (kHz)								
2065.0[1,3]	4146	6224	8294	12353	16528	18840	22159	25115
2079.0[1,3]	4149	6227	8297	12356	16531	18843	22162	25118
2096.5[1]	4125[2]	6230		12359	16534		22165	
3023.0[4]	4417[5]	6516[5]					22168	
	5680[4]						22171	

1 Limited to peak envelope power of 150 watts.
2 The frequency 4125 kHz is also available for distress and safety, and calling and reply, see § 80.369(b) and (d) of this part.
3 The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.
4 The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.
5 The frequency 6516 kHz is limited to daytime operations. The frequencies 4417 kHz and 6516 kHz are also available for calling and reply, see § 80.369(d) of this part.

* * * * *

(i) Frequencies in the 1600-5450 kHz band for private communications in Alaska. The following simplex frequencies are available for assignment to private fixed stations located in the State of Alaska for radiotelephony communications with ship stations. These simplex frequencies are available for use by authorized ship stations for radiotelephony communications with private fixed stations located in the State of Alaska.

Private communications in Alaska Carrier frequencies (kHz)		
1619.0	2382.0	2563.0
1622.0	2419.0	2566.0
1643.0	2422.0	2590.0
1646.0	2427.0	2616.0
1649.0	2430.0	3258.0
1652.0	2447.0	3261.0[1]
1705.0	2450.0	4366.0
1709.0	2479.0	4369.0
1712.0	2482.0	4396.0
2003.0	2506.0	4402.0
2006.0	2509.0	4420.0
2115.0	2512.0	4423.0
2118.0	2535.0	5167.5
2379.0	2538.0	

1 Ship stations must limit use of 3261.0 kHz to communications over distances which cannot be reached by the use of a frequency below 2700 kHz or above 156.000 MHz.

* * * * *

12. A new Section 80.374 and heading are added to read as follows:

§ 80.374 Special provisions for frequencies in the 4000-4063 kHz and the 8100-8195 kHz bands shared with the fixed service.

Until implementation procedures and schedules are determined by a conference of the International Telecommunications Union (ITU), the bands 4000-4063 kHz and 8100-8195 kHz are allocated on a shared primary basis between the fixed service and the maritime mobile service; see § 2.106, note US236, of the Commission's Rules. Frequency assignments in the 4000-4063 kHz and 8100-8195 kHz bands are subject to coordination with government users. Additionally, coast station assignments in the 4000-4063 kHz band deviate from international provisions. Coast station assignments in the 4000-4063 kHz band are permitted provided that harmful interference is not caused to, and must accept interference from, stations operated by other countries in accordance with the Radio Regulations (see Radio Regulation Nos. 342 and 517).

(a) Application requirements. Applicants for public coast station frequencies described in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed 4, 6, and 8 MHz frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) Frequencies in the 4000-4063 kHz band.

(1) The frequencies in the 4000-4063 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations;

(iii) ship-to-shore or shore-to-ship simplex operations; or

(iv) duplex operations with coast stations assigned in the band 4438-4650 kHz, as described in § 80.373(d) of this part.

(2) The following table describes the channelization of carrier frequencies in the 4000-4063 kHz band.

Carrier Frequencies (kHz)			
4000	4015	4030	4045
4003	4018	4033	4048
4006	4021	4036	4051
4009	4024	4039	4054
4012	4027	4042	4057

(c) Frequencies in the 8100-8195 kHz band.

(1) The frequencies in the 8100-8195 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations; or

(iii) ship-to-shore or shore-to-ship simplex operations.

(2) The following table describes the channelization of carrier frequencies in the 8100-8195 kHz band.

Carrier frequencies (kHz)		
8101	8137	8167
8104	8140	8170
8107	8143	8173
8110	8146	8176
8116	8149	8179
8119	8152	8182
8122	8155	8185
8125	8158	8188
8131	8161	8191
8134	8164	

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 6, 1991

FREQUENCY CHANGES FOR MARITIME MOBILE STATIONS OPERATING ON FREQUENCIES BETWEEN 4000 kHz and 27500 kHz (Report and Order, PR Docket 90-133, adopted January 10, 1991)

This Public Notice indicates the new frequencies to which authorized ship and *public and private* coast stations that operate in the high frequency (HF) bands between 4000 kHz and 27500 kHz must switch effective 0001 hours Coordinated Universal Time (UTC) on July 1, 1991. The HF band frequencies are used for long range radio communication on the high seas. This Public Notice also includes additional digital selective calling (DSC), narrow-band direct-printing (NBDP), and radiotelephony (HF-SSB) frequencies that will be effective July 1, 1991.

These changes were adopted by the Commission on January 10, 1991, (see *Report and Order*, PR Docket No. 90-133). The revisions are required to incorporate in the Commission's Rules the changes adopted by the Final Acts of the World Administrative Radio Conference for Mobile Services, Geneva, 1987. These revisions to the international Radio Regulations changed the maritime channeling plans in the HF bands between 4000-27500 kHz allocated exclusively to the maritime mobile service. No changes to maritime frequencies in the 156-174 MHz (VHF) or 2000-3000 kHz (MF) bands were made.

The HF band revisions reflect a worldwide decrease in manual Morse code telegraphy (CW) ship frequencies and an increase in coast and ship frequencies for DSC, NBDP, and HF-SSB radio communications. To accomplish the shift from manual to automated systems, the existing maritime frequencies were also rearranged. Consequently, at 0001 hours UTC on July 1, 1991, virtually every maritime station worldwide, coast and ship, public and private, operating on frequencies between 4000-27500 kHz must change frequencies.

There are over 9,000 public and private coast stations currently licensed by the Commission that are authorized frequencies in the HF bands. Those coast station licenses (renewed, modified, or new licenses) that were issued in the past year include both sets of frequencies (*i.e.*, one valid until June 30, 1991, and the other effective July 1, 1991). On or about April 1, 1991, the remaining public and private coast station licensees will be sent a direct mailing of this Public Notice which indicates the frequencies that are effective as of July 1, 1991, in accordance with *Report and Order* in PR Docket No. 90-133. They do not need to apply for a modification of their licenses.

Ship stations also must change to the new operating frequencies at 0001 hours UTC on July 1, 1991, as denoted in the *Report and Order* and summarized herein. A direct mailing will not be sent to the approximately 40,000 ship licensees. This Public Notice indicates all HF frequencies available to authorized ship stations. Ship stations that are authorized HF-SSB operations (denoted on the license as "Radiotelephone 4000-23000 kHz") do not need to apply for an updated license. They may use the new 25 MHz HF-SSB frequencies without applying for a modification of their license. (The license will be updated to "Radiotelephone 4000-27500 kHz" upon renewal.) Any ship that does not have a "Radiotelephone 4000-23000 kHz" authorization and desires to use SSB frequencies 4000 kHz or greater must apply to the Federal Communications Commission (FCC) for a modification of its license.

For completeness, the additional DSC, NBDP, and HF-SSB frequencies that become effective as of July 1, 1991, have been included in the appropriate tables. Because these are new and do not replace existing frequencies, we have placed a dash (----) in the "Frequency prior to July 1, 1991" column. We emphasize that these additional frequencies are included here for information only. *Coast stations are authorized to operate on their replacement frequency only*. Any coast station that desires additional frequency authorizations must apply to the FCC. Coast station applications for the additional DSC, NBDP, and HF-SSB frequencies may be filed with the Commission as of March 1, 1991, but they cannot be used until July 1, 1991 (see *Report and Order*, PR Docket No. 90-133, for details).

This Public Notice supersedes previous Public Notices, DA 90-407, 5 FCC Rcd 1682 (1990) and DA 90-408, 5 FCC Rcd 1683 (1990), both released March 16, 1990. Further, this Public Notice is only a summary of the frequency changes adopted by the Commission's *Report and Order* in PR Docket No. 90-133.

For further information about licensing contact: Consumer Assistance Branch, Licensing Division, Private Radio Bureau, Federal Communications Commission, Gettysburg, PA 17325-7245; or telephone 717-337-1212. For further information about technical matters, contact: Katy Hosford, Special Services Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554; or telephone 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT A
HF Frequencies for Distress and Safety

The following table describes the distress and safety frequencies between 4000-27500 kHz for ship and coast stations, public and private, operating radiotelephony (HF-SSB), narrow-band direct-printing (NBDP), and digital selective calling (DSC).

Frequency (kHz) prior to July 1, 1991	Frequency (kHz) as of July 1, 1991
HF-SSB:	
4125.0	no change
6215.5	6215.0
8257.0	8291.0
12392.0	12290.0
16522.0	16420.0
NBDP:	
4177.5	no change
6268.0	no change
8357.5	no change
12520.0	no change
16695.0	no change
DSC:	
4188.0	4207.5
6282.0	6312.0
8375.0	8414.5
12563.0	12577.0
16750.0	16804.5

This Public Notice is for informational purposes only. For complete discussion of amendments to 47 C.F.R. Part 80 for the maritime radio service, see Report and Order, PR Docket No. 90-133.

ATTACHMENT B
HF Frequencies for Radiotelegraphy

Call and reply Morse code frequencies: The following table supersedes the previous arrangement of frequency families (Family Series Nos. 1 to 18) as prescribed in 47 C.F.R. § 80.355. It describes the new calling frequencies (ITU Designators 1 to 10, A, B, and C) in the 4000-27500 kHz band which are available for use by authorized ship stations equipped with crystal controlled oscillators for A1A or J2A radiotelegraphy. There are two series of frequencies for worldwide use and two series of frequencies for each geographic region. Ship stations with synthesized transmitters may operate on every full 100 Hz increment in the 0.5 kHz channel for the frequencies listed, except for 100 Hz above and below those designated for worldwide use. During normal business hours when not communicating on other frequencies, all U.S. public coast radiotelegraph stations must monitor the worldwide frequencies and the initial calling frequencies for the region in which it is located. The specific frequencies which must be monitored by a coast station will vary with propagation conditions. The calling frequencies which are routinely monitored by specific coast stations can be determined by reference to the ITU publication entitled "List of Coast Stations". Initial calls by ship stations must be made on the appropriate initial calling frequency first. Calls on the worldwide frequencies may be made only after calls on the appropriate initial calling frequency are unsuccessful.

Ship Morse calling frequencies (kHz)									
Region	ITU							ITU	
Worldwide	3	4184.0	6276.0	8368.0	12552.0	16736.0	22280.5	C	25172.0
	4	4184.5	6276.5	8369.0	12553.5	16738.0	22281.0	C	25172.0
Atlantic									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Caribbean									
initial	1	4182.0	6277.0	8366.0	12550.0	16734.0	22279.5	A	25171.5
alternate	2	4182.5	6277.5	8366.5	12550.5	16734.5	22280.0	A	25171.5
Gulf-Mexico									
initial	5	4183.0	6278.0	8367.0	12551.0	16735.0	22281.5	A	25171.5
alternate	6	4183.5	6278.5	8367.5	12551.5	16735.5	22282.0	A	25171.5
N Pacific									
initial	7	4185.0	6279.0	8368.5	12552.5	16736.5	22282.5	B	25172.5
alternate	8	4185.5	6279.5	8369.5	12553.0	16737.0	22283.0	B	25172.5

This Public Notice is for informational purposes only. For complete discussion of amendments to 47 C.F.R. Part 80 for the maritime radio service, see Report and Order, PR Docket No. 90-133.

S Pacific initial	9	4186.0	6280.0	8370.0	12554.0	16737.5	22283.5	B	25172.5
alternate	10	4186.5	6280.5	8370.5	12554.5	16738.5	22284.0	B	25172.5

Ship Morse code working (CW) frequencies: The following table supersedes the previous arrangement of 62 Channel Series as prescribed in 47 C.F.R. § 80.357(a). Ship stations must use these new frequencies for the particular Channel Series that they are assigned. For example, if a ship station is authorized Channel Series W1 and W32, then the 4 MHz frequencies of 4187.0 kHz and 4202.0 kHz as denoted in the table below replace their previous frequencies of 4188.5 kHz and 4204.0 kHz. If the frequencies listed in the table below are not adequate for communications, ship stations may use any of the non-paired NBDP frequencies listed later in this document for A1A or J2A radiotelegraphy.

Channel Series	Ship Morse working frequencies (kHz)						
W1	4187.0	6285.0	8342.0	12422.0	16619.0	22242.0	25161.5
			8343.5	12453.0	16650.0	22273.0	
					16681.0		
W2	4187.5	6285.5	8342.5	12422.5	16619.5	22242.5	25162.0
			8344.0	12453.5	16650.5	22273.5	
					16681.5		
W3	4188.0	6286.0	8343.0	12423.0	16620.0	22243.0	25162.5
			8344.5	12454.0	16651.0	22274.0	
					16682.0		
W4	4188.5	6286.5	8343.5	12423.5	16620.5	22243.5	25163.0
			8345.0	12454.5	16651.5	22274.5	
					16682.5		
W5	4189.0	6287.0	8344.0	12424.0	16621.0	22244.0	25163.5
			8345.5	12455.0	16652.0	22275.0	
					16683.0		
W6	4189.5	6287.5	8344.5	12424.5	16621.5	22244.5	25164.0
			8346.0	12455.5	16652.5	22275.5	
					16619.0		
W7	4190.0	6288.0	8345.0	12425.0	16622.0	22245.0	25164.5
			8346.5	12456.0	16653.0	22276.0	
					16619.5		
W8	4190.5	6288.5	8345.5	12425.5	16622.5	22245.5	25165.0
			8347.0	12456.5	16653.5	22276.5	
					16620.0		
W9	4191.0	6289.0	8346.0	12426.0	16623.0	22246.0	25165.5
			8347.5	12457.0	16654.0	22277.0	
					16620.5		
W10	4191.5	6289.5	8346.5	12426.5	16623.5	22246.5	25166.0

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			8348.0	12457.5	16654.5	22270.5	
					16621.0		
W11	4192.0	6290.0	8347.0	12427.0	16624.0	22247.0	25166.5
			8348.5	12458.0	16655.0	22278.0	
					16621.5		
W12	4192.5	6290.5	8347.5	12427.5	16624.5	22247.5	25167.0
			8349.0	12458.5	16655.5	22278.5	
					16622.0		
W13	4193.0	6291.0	8348.0	12428.0	16625.0	22248.0	25167.5
			8349.5	12459.0	16656.0	22279.0	
					16622.5		
W14	4193.5	6291.5	8348.5	12428.5	16625.5	22248.5	25168.0
			8350.0	12459.5	16656.5	22242.0	
					16623.0		
W15	4194.0	6292.0	8349.0	12429.0	16626.0	22249.0	25168.5
			8350.5	12460.0	16657.0	22242.5	
					16623.5		
W16	4194.5	6292.5	8349.5	12429.5	16626.5	22249.5	25169.0
			8351.0	12460.5	16657.5	22243.0	
					16624.0		
W17	4195.0	6293.0	8350.0	12430.0	16627.0	22250.0	25169.5
			8351.5	12461.0	16658.0	22243.5	
					16624.5		
W18	4195.5	6293.5	8350.5	12430.5	16627.5	22250.5	25170.0
			8352.0	12461.5	16658.5	22244.0	
					16625.0		
W19	4196.0	6294.0	8351.0	12431.0	16628.0	22251.0	25170.5
			8352.5	12462.0	16659.0	22244.5	
					16625.5		
W20	4196.5	6294.5	8351.5	12431.5	16628.5	22251.5	25171.0
			8353.0	12462.5	16659.5	22245.0	
					16626.0		
W21	4197.0	6295.0	8352.0	12432.0	16629.0	22252.0	25161.5
			8353.5	12463.0	16660.0	22245.5	
					16626.5		
W22	4197.5	6295.5	8352.5	12432.5	16629.5	22252.5	25162.0
			8354.0	12463.5	16660.5	22246.0	
					16627.0		
W23	4198.0	6296.0	8353.0	12433.0	16630.0	22253.0	25162.5
			8354.5	12464.0	16661.0	22246.5	
					16627.5		
W24	4198.5	6296.5	8353.5	12433.5	16630.5	22253.5	25163.0
			8355.0	12464.5	16661.5	22247.0	
					16628.0		
W25	4199.0	6297.0	8354.0	12434.0	16631.0	22254.0	25163.5
			8355.5	12465.0	16662.0	22247.5	
					16628.5		
W26	4199.5	6297.5	8354.5	12434.5	16631.5	22254.5	25164.0
			8356.0	12465.5	16662.5	22248.0	

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					16629.0		
W27	4200.0	6298.0	8355.0	12435.0	16632.0	22255.0	25164.5
			8356.5	12466.0	16663.0	22248.5	
					16629.5		
W28	4200.5	6298.5	8355.5	12435.5	16632.5	22255.5	25165.0
			8357.0	12466.5	16663.5	22249.0	
					16630.0		
W29	4201.0	6299.0	8356.0	12436.0	16633.0	22256.0	25165.5
			8357.5	12467.0	16664.0	22249.5	
					16630.5		
W30	4201.5	6299.5	8356.5	12436.5	16633.5	22256.5	25166.0
			8358.0	12467.5	16664.5	22250.0	
					16631.0		
W31	4202.0	6300.0	8357.0	12437.0	16634.0	22257.0	25166.5
			8358.5	12468.0	16665.0	22250.5	
					16631.5		

Channel Series	Ship Morse working frequencies (kHz) (table continued)						
W32	4202.0	6300.0	8357.5	12437.5	16634.5	22257.5	25167.0
			8359.0	12468.5	16665.5	22251.0	
					16632.0		
W33	4201.5	6299.5	8358.0	12438.0	16635.0	22258.0	25167.5
			8359.5	12469.0	16666.0	22251.5	
					16632.5		
W34	4201.0	6299.0	8358.5	12438.5	16635.5	22258.5	25168.0
			8360.0	12469.5	16666.5	22252.0	
					16633.0		
W35	4200.5	6298.5	8359.0	12439.0	16636.0	22259.0	25168.5
			8360.5	12470.0	16667.0	22252.5	
					16633.5		
W36	4200.0	6298.0	8359.5	12439.5	16636.5	22259.5	25169.0
			8361.0	12470.5	16667.5	22253.0	
					16634.0		
W37	4199.5	6297.5	8360.0	12440.0	16637.0	22260.0	25169.5
			8361.5	12471.0	16668.0	22253.5	
					16634.5		
W38	4199.0	6297.0	8360.5	12440.5	16637.5	22260.5	25170.0
			8362.0	12471.5	16668.5	22254.0	
					16635.0		
W39	4198.5	6296.5	8361.0	12441.0	16638.0	22261.0	25170.5
			8362.5	12472.0	16669.0	22254.5	
					16635.5		
W40	4198.0	6296.0	8361.5	12441.5	16638.5	22261.5	25171.0
			8363.0	12472.5	16669.5	22255.0	
					16636.0		
W41	4197.5	6295.5	8362.0	12442.0	16639.0	22262.0	25161.5

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			8363.5	12473.0	16670.0	22255.5	
					16636.5		
W42	4197.0	6295.0	8362.5	12442.5	16639.5	22262.5	25162.0
			8364.0	12473.5	16670.5	22256.0	
					16637.0		
W43	4196.5	6294.5	8363.0	12443.0	16640.0	22263.0	25162.5
			8364.5	12474.0	16671.0	22256.5	
					16637.5		
W44	4196.0	6294.0	8363.5	12443.5	16640.5	22263.5	25163.0
			8365.0	12474.5	16671.5	22257.0	
					16638.0		
W45	4195.5	6293.5	8364.0	12444.0	16641.0	22264.0	25163.5
			8365.5	12475.0	16672.0	22257.5	
					16638.5		
W46	4195.0	6293.0	8364.5	12444.5	16641.5	22264.5	25164.0
			8371.0	12475.5	16672.5	22258.0	
					16639.0		
W47	4194.5	6292.5	8365.0	12445.0	16642.0	22265.0	25164.5
			8371.5	12476.0	16673.0	22258.5	
					16639.5		
W48	4194.0	6292.0	8365.5	12445.5	16642.5	22265.5	25165.0
			8372.0	12476.5	16673.5	22259.0	
					16640.0		
W49	4193.5	6291.5	8371.0	12446.0	16643.0	22266.0	25165.5
			8372.5	12422.0	16674.0	22259.5	
					16640.5		
W50	4193.0	6291.0	8371.5	12446.5	16643.5	22266.5	25166.0
			8373.0	12422.5	16674.5	22260.0	
					16641.0		
W51	4192.5	6290.5	8372.0	12447.0	16644.0	22267.0	25166.5
			8373.5	12423.0	16675.0	22260.5	
					16641.5		
W52	4192.0	6290.0	8372.5	12447.5	16644.5	22267.5	25167.0
			8374.0	12423.5	16675.5	22261.0	
					16642.0		
W53	4191.5	6289.5	8373.0	12448.0	16645.0	22268.0	25167.5
			8374.5	12424.0	16676.0	22261.5	
					16642.5		
W54	4191.0	6289.0	8373.5	12448.5	16645.5	22268.5	25168.0
			8375.0	12424.5	16676.5	22262.0	
					16643.0		
W55	4190.5	6288.5	8374.0	12449.0	16646.0	22269.0	25168.5
			8375.5	12425.0	16677.0	22262.5	
					16643.5		
W56	4190.0	6288.0	8374.5	12449.5	16646.5	22269.5	25169.0
			8376.0	12425.5	16677.5	22263.0	
					16644.0		
W57	4189.5	6287.5	8375.0	12450.0	16647.0	22270.0	25169.5
			8342.0	12426.0	16678.0	22263.5	

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					16644.5		
W58	4189.0	6287.0	8375.5	12450.5	16647.5	22270.5	25170.0
			8342.5	12426.5	16678.5	22264.0	
					16645.0		
W59	4188.5	6286.5	8376.0	12451.0	16648.0	22271.0	25170.5
			8343.0	12427.0	16679.0	22264.5	
					16645.5		
W60	4188.0	6286.0	8342.0	12451.5	16648.5	22271.5	25171.0
			8343.5	12427.5	16679.5	22265.0	
					16646.0		
W61	4187.5	6285.5	8342.5	12452.0	16649.0	22272.0	25161.5
			8344.0	12428.0	16680.0	22265.5	
					16646.5		
W62	4187.0	6285.0	8343.0	12452.5	16649.5	22272.5	25162.0
			8344.5	12428.5	16680.5	22266.0	
					16678.0		

Coast Morse code working (CW) frequencies: The following public coast station frequencies for A1A or J2A radiotelegraphy must be replaced on July 1, 1991, in accordance with 47 C.F.R. § 80.357(b). The remaining coast stations frequencies for Morse code telegraphy were not affected.

Public Coast Stations Working Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
16861.7	17199.2
16871.3	17208.8
16880.9	17218.4
22318.5	22569.0
22320.0	22570.5
22348.5	22599.0
22407.0	22657.0
22413.0	22663.5
22425.0	22675.5
22431.0	22681.0

Frequencies for DSC: The following table supercedes the previous arrangement of frequencies available for use by authorized ship and coast stations for general purpose DSC in accordance with 47 C.F.R. § 80.359. There are three series of

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paired frequencies. One series is for worldwide use and it replaces previous DSC frequency authorizations (e.g., frequencies 4208.0 kHz and 4219.5 kHz replace previous frequencies 4187.5 kHz and 4357.0 kHz for ship and coast stations, respectively). The other two series are new and they are designated for regional use. The "Series A" designation includes coast stations along, and ship stations in, the Atlantic Ocean, the Gulf of Mexico, and the Caribbean Sea. The "Series B" designation includes stations in any remaining areas. Stations must initiate contact on the appropriate regional frequency depending upon the location of the called station and propagation conditions. Acknowledgement is made on the paired frequency. The worldwide frequencies may be used for international calling, if calls on the appropriate regional frequencies are unsuccessful, or the regional series does not contain the appropriate band (e.g., 2 MHz). During normal working hours, all public coast stations capable of DSC operations must monitor the worldwide and regional frequencies appropriate for its location. The specific frequencies to be monitored will vary with propagation conditions.

Reminder - Coast stations are authorized to operate on their frequency equivalent only. Coast stations that operate DSC must apply to the Federal Communications Commission for authority to use the additional DSC frequencies.

General Purpose DSC
(in kHz unless otherwise noted)

Worldwide		Series A		Series B	
Ship	Coast	Ship	Coast	Ship	Coast
458.5	455.5	---	---	---	---
2189.5	2177.0[1]	---	---	---	---
4208.0	4219.5	4208.5	4220.0	4209.0	4220.5
6312.5	6331.0	6313.0	6331.5	6313.5	6332.0
8415.0	8436.5	8415.5	8437.0	8416.0	8437.5
12577.5	12657.0	12578.0	12657.5	12578.5	12658.0
16805.0	16903.0	16805.5	16903.5	16806.0	16904.0
18898.5	19703.5	18899.0	19704.0	18899.5	19704.5
22374.5	22444.0	22375.0	22444.5	22375.5	22445.0
25208.5	26121.0	25209.0	26121.5	25209.5	26122.0
156.525 MHz	156.525 MHz	---	---	---	---

1 The frequency 2177.0 kHz is also available to ship stations for intership calling and acknowledgement of such calls only.

Paired frequencies for NBDP and data transmissions: The following table describes both the frequency changes and the additional NBDP frequenies that are available for stations operating paired NBDP and data transmissions in accordance with 47 C.F.R. § 80.361(a). Because the revised Radio Regulations includes distress and safety NBDP frequencies within its Appendix 32 list, there are no direct transfer frequencies for four of the existing NBDP

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frequency pairs. In these instances, we have substituted frequencies from the expanded NBDP band in accordance with instructions from the International Frequency Registration Board (IFRB) in Circular-letter No. 830, dated July 11, 1990. For clarity, the distress and safety NBDP channel numbers have been included in the table and identified by an asterisk (*).

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. Any coast station that desires additional frequencies must apply to the Federal Communications Commission.

Paired frequencies for NBDP and data transmissions (kHz)				
	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
401	4350.0	4210.5	4170.5	4172.5
402	4350.5	4211.0	4171.0	4173.0
403	4351.0	4211.5	4171.5	4173.5
404	4351.5	4212.0	4172.0	4174.0
405	4352.0	4212.5	4172.5	4174.5
406	4352.5	4213.0	4173.0	4175.0
407	4353.0	4213.5	4173.5	4175.5
408	4353.5	4214.0	4174.0	4176.0
409	4354.0	4214.5	4174.5	4176.5
410	4354.5	4215.0	4175.0	4177.0
411*	4355.0	use Ch. 415	4175.5	use Ch. 415
412	4355.5	4215.5	4176.0	4178.0
413	4356.0	4216.0	4176.5	4178.5
414	4356.5	4216.5	4177.0	4179.0
415	----	4217.0	----	4179.5
416	----	4217.5	----	4180.0
417	----	4218.0	----	4180.5
601	6494.5	6314.5	6256.5	6263.0
602	6495.0	6315.0	6257.0	6263.5
603	6495.5	6315.5	6257.5	6264.0
604	6496.0	6316.0	6258.0	6264.5
605	6496.5	6316.5	6258.5	6265.0
606	6497.0	6317.0	6259.0	6265.5
607	6497.5	6317.5	6259.5	6266.0
608	6498.0	6318.0	6260.0	6266.5
609	6498.5	6318.5	6260.5	6267.0
610	6499.0	6319.0	6261.0	6267.5
611*	6499.5	use Ch. 624	6261.5	use Ch. 624
612	6500.0	6319.5	6262.0	6268.5
613	6500.5	6320.0	6262.5	6269.0

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614	6501.0	6320.5	6263.0	6269.5
615	6501.5	6321.0	6263.5	6270.0
616	6502.0	6321.5	6264.0	6270.5
617	6502.5	6322.0	6264.5	6271.0
618	6503.0	6322.5	6265.0	6271.5
619	6503.5	6323.0	6265.5	6272.0
620	6504.0	6323.5	6266.0	6272.5
621	6504.5	6324.0	6266.5	6273.0
622	6505.0	6324.5	6267.0	6273.5
623	6505.5	6325.0	6267.5	6274.0
624	----	6325.5	----	6274.5
625	----	6326.0	----	6275.0
626	----	6326.5	----	6275.5
627	----	6327.0	----	6281.0
628	----	6327.5	----	6281.5
629	----	6328.0	----	6282.0
801*	8705.0	use Ch. 828	8344.0	use Ch. 828
802	8705.5	8417.0	8344.5	8377.0
803	8706.0	8417.5	8345.0	8377.5
804	8706.5	8418.0	8345.5	8378.0
805	8707.0	8418.5	8346.0	8378.5
806	8707.5	8419.0	8346.5	8379.0
807	8708.0	8419.5	8347.0	8379.5
808	8708.5	8420.0	8347.5	8380.0
809	8709.0	8420.5	8348.0	8380.5
810	8709.5	8421.0	8348.5	8381.0
811	8710.0	8421.5	8349.0	8381.5
812	8710.5	8422.0	8349.5	8382.0
813	8711.0	8422.5	8350.0	8382.5
814	8711.5	8423.0	8350.5	8383.0
815	8712.0	8423.5	8351.0	8383.5
816	8712.5	8424.0	8351.5	8384.0
817	8713.0	8424.5	8352.0	8384.5
818	8713.5	8425.0	8352.5	8385.0
819	8714.0	8425.5	8353.0	8385.5
820	8714.5	8426.0	8353.5	8386.0
821	8715.0	8426.5	8354.0	8386.5
822	8715.5	8427.0	8354.5	8387.0
823	8716.0	8427.5	8355.0	8387.5
824	8716.5	8428.0	8355.5	8388.0
825	8717.0	8428.5	8356.0	8388.5
826	8717.5	8429.0	8356.5	8389.0
827	8718.0	8429.5	8357.0	8389.5
828	----	8430.0	----	8390.0
829	----	8430.5	----	8390.5
830	----	8431.0	----	8391.0
831	----	8431.5	----	8391.5
832	----	8432.0	----	8392.0

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833	----	8432.5	----	8392.5
834	----	8433.0	----	8393.0

Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
1201	13071.5	12579.5	12491.5	12477.0
1202	13072.0	12580.0	12492.0	12477.5
1203	13072.5	12580.5	12492.5	12478.0
1204	13073.0	12581.0	12493.0	12478.5
1205	13073.5	12581.5	12493.5	12479.0
1206	13074.0	12582.0	12494.0	12479.5
1207	13074.5	12582.5	12494.5	12480.0
1208	13075.0	12583.0	12495.0	12480.5
1209	13075.5	12583.5	12495.5	12481.0
1210	13076.0	12584.0	12496.0	12481.5
1211	13076.5	12584.5	12496.5	12482.0
1212	13077.0	12585.0	12497.0	12482.5
1213	13077.5	12585.5	12497.5	12483.0
1214	13078.0	12586.0	12498.0	12483.5
1215	13078.5	12586.5	12498.5	12484.0
1216	13079.0	12587.0	12499.0	12484.5
1217	13079.5	12587.5	12499.5	12485.0
1218	13080.0	12588.0	12500.0	12485.5
1219	13080.5	12588.5	12500.5	12486.0
1220	13081.0	12589.0	12501.0	12486.5
1221	13081.5	12589.5	12501.5	12487.0
1222	13082.0	12590.0	12502.0	12487.5
1223	13082.5	12590.5	12502.5	12488.0
1224	13083.0	12591.0	12503.0	12488.5
1225	13083.5	12591.5	12503.5	12489.0
1226	13084.0	12592.0	12504.0	12489.5
1227	13084.5	12592.5	12504.5	12490.0
1228	13085.0	12593.0	12505.0	12490.5
1229	13085.5	12593.5	12505.5	12491.0
1230	13086.0	12594.0	12506.0	12491.5
1231	13086.5	12594.5	12506.5	12492.0
1232	13087.0	12595.0	12507.0	12492.5
1233	13087.5	12595.5	12507.5	12493.0
1234	13088.0	12596.0	12508.0	12493.5
1235	13088.5	12596.5	12508.5	12494.0
1236	13089.0	12597.0	12509.0	12494.5
1237	13089.5	12597.5	12509.5	12495.0

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1238	13090.0	12598.0	12510.0	12495.5
1239	13090.5	12598.5	12510.5	12496.0
1240	13091.0	12599.0	12511.0	12496.5
1241	13091.5	12599.5	12511.5	12497.0
1242	13092.0	12600.0	12512.0	12497.5
1243	13092.5	12600.5	12512.5	12498.0
1244	13093.0	12601.0	12513.0	12498.5
1245	13093.5	12601.5	12513.5	12499.0
1246	13094.0	12602.0	12514.0	12499.5
1247	13094.5	12602.5	12514.5	12500.0
1248	13095.0	12603.0	12515.0	12500.5
1249	13095.5	12603.5	12515.5	12501.0
1250	13096.0	12604.0	12516.0	12501.5
1251	13096.5	12604.5	12516.5	12502.0
1252	13097.0	12605.0	12517.0	12502.5
1253	13097.5	12605.5	12517.5	12503.0
1254	13098.0	12606.0	12518.0	12503.5
1255	13098.5	12606.5	12518.5	12504.0
1256	13099.0	12607.0	12519.0	12504.5
1257	13099.5	12607.5	12519.5	12505.0
1258	----	12608.0	----	12505.5
1259	----	12608.5	----	12506.0
1260	----	12609.0	----	12506.5
1261	----	12609.5	----	12507.0
1262	----	12610.0	----	12507.5
1263	----	12610.5	----	12508.0
1264	----	12611.0	----	12508.5
1265	----	12611.5	----	12509.0
1266	----	12612.0	----	12509.5
1267	----	12612.5	----	12510.0
1268	----	12613.0	----	12510.5
1269	----	12613.5	----	12511.0
1270	----	12614.0	----	12511.5
1271	----	12614.5	----	12512.0
1272	----	12615.0	----	12512.5
1273	----	12615.5	----	12513.0
1274	----	12616.0	----	12513.5
1275	----	12616.5	----	12514.0
1276	----	12617.0	----	12514.5
1277	----	12617.5	----	12515.0
1278	----	12618.0	----	12515.5
1279	----	12618.5	----	12516.0
1280	----	12619.0	----	12516.5
1281	----	12619.5	----	12517.0
1282	----	12620.0	----	12517.5
1283	----	12620.5	----	12518.0
1284	----	12621.0	----	12518.5
1285	----	12621.5	----	12519.0
1286	----	12622.0	----	12519.5

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1287*	----	----	----	----
1288	----	12622.5	----	12520.5
1289	----	12623.0	----	12521.0
1290	----	12623.5	----	12521.5
1291	----	12624.0	----	12522.0
1292	----	12624.5	----	12522.5
1293	----	12625.0	----	12523.0
1294	----	12625.5	----	12523.5
1295	----	12626.0	----	12524.0
1296	----	12626.5	----	12524.5
1297	----	12627.0	----	12525.0
1298	----	12627.5	----	12525.5
1299	----	12628.0	----	12526.0
1300	----	12628.5	----	12526.5
1301	----	12629.0	----	12527.0
1302	----	12629.5	----	12527.5
1303	----	12630.0	----	12528.0
1304	----	12630.5	----	12528.5
1305	----	12631.0	----	12529.0
1306	----	12631.5	----	12529.5
1307	----	12632.0	----	12530.0

Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
1601	17197.5	16807.0	16660.5	16683.5
1602	17198.0	16807.5	16661.0	16684.0
1603	17198.5	16808.0	16661.5	16684.5
1604	17199.0	16808.5	16662.0	16685.0
1605	17199.5	16809.0	16662.5	16685.5
1606	17200.0	16809.5	16663.0	16686.0
1607	17200.5	16810.0	16663.5	16686.5
1608	17201.0	16810.5	16664.0	16687.0
1609	17201.5	16811.0	16664.5	16687.5
1610	17202.0	16811.5	16665.0	16688.0
1611	17202.5	16812.0	16665.5	16688.5
1612	17203.0	16812.5	16666.0	16689.0
1613	17203.5	16813.0	16666.5	16689.5
1614	17204.0	16813.5	16667.0	16690.0
1615	17204.5	16814.0	16667.5	16690.5
1616	17205.0	16814.5	16668.0	16691.0
1617	17205.5	16815.0	16668.5	16691.5
1618	17206.0	16815.5	16669.0	16692.0

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1619	17206.5	16816.0	16669.5	16692.5
1620	17207.0	16816.5	16670.0	16693.0
1621	17207.5	16817.0	16670.5	16693.5
1622	17208.0	16817.5	16671.0	16694.0
1623	17208.5	16818.0	16671.5	16694.5
1624*	17209.0	use Ch. 1670	16672.0	use Ch. 1670
1625	17209.5	16818.5	16672.5	16695.5
1626	17210.0	16819.0	16673.0	16696.0
1627	17210.5	16819.5	16673.5	16696.5
1628	17211.0	16820.0	16674.0	16697.0
1629	17211.5	16820.5	16674.5	16697.5
1630	17212.0	16821.0	16675.0	16698.0
1631	17212.5	16821.5	16675.5	16698.5
1632	17213.0	16822.0	16676.0	16699.0
1633	17213.5	16822.5	16676.5	16699.5
1634	17214.0	16823.0	16677.0	16700.0
1635	17214.5	16823.5	16677.5	16700.5
1636	17215.0	16824.0	16678.0	16701.0
1637	17215.5	16824.5	16678.5	16701.5
1638	17216.0	16825.0	16679.0	16702.0
1639	17216.5	16825.5	16679.5	16702.5
1640	17217.0	16826.0	16680.0	16703.0
1641	17217.5	16826.5	16680.5	16703.5
1642	17218.0	16827.0	16681.0	16704.0
1643	17218.5	16827.5	16681.5	16704.5
1644	17219.0	16828.0	16682.0	16705.0
1645	17219.5	16828.5	16682.5	16705.5
1646	17220.0	16829.0	16683.0	16706.0
1647	17220.5	16829.5	16683.5	16706.5
1648	17221.0	16830.0	16684.0	16707.0
1649	17221.5	16830.5	16684.5	16707.5
1650	17222.0	16831.0	16685.0	16708.0
1651	17222.5	16831.5	16685.5	16708.5
1652	17223.0	16832.0	16686.0	16709.0
1653	17223.5	16832.5	16686.5	16709.5
1654	17224.0	16833.0	16687.0	16710.0
1655	17224.5	16833.5	16687.5	16710.5
1656	17225.0	16834.0	16688.0	16711.0
1657	17225.5	16834.5	16688.5	16711.5
1658	17226.0	16835.0	16689.0	16712.0
1659	17226.5	16835.5	16689.5	16712.5
1660	17227.0	16836.0	16690.0	16713.0
1661	17227.5	16836.5	16690.5	16713.5
1662	17228.0	16837.0	16691.0	16714.0
1663	17228.5	16837.5	16691.5	16714.5
1664	17229.0	16838.0	16692.0	16715.0
1665	17229.5	16838.5	16692.5	16715.5
1666	17230.0	16839.0	16693.0	16716.0
1667	17230.5	16839.5	16693.5	16716.5

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1668	17231.0	16840.0	16694.0	16717.0
1669	17231.5	16840.5	16694.5	16717.5
1670	----	16841.0	----	16718.0
1671	----	16841.5	----	16718.5
1672	----	16842.0	----	16719.0
1673	----	16842.5	----	16719.5
1674	----	16843.0	----	16720.0
1675	----	16843.5	----	16720.5
1676	----	16844.0	----	16721.0
1677	----	16844.5	----	16721.5
1678	----	16845.0	----	16722.0
1679	----	16845.5	----	16722.5
1680	----	16846.0	----	16723.0
1681	----	16846.5	----	16723.5
1682	----	16847.0	----	16724.0
1683	----	16847.5	----	16724.5
1684	----	16848.0	----	16725.0
1685	----	16848.5	----	16725.5
1686	----	16849.0	----	16726.0
1687	----	16849.5	----	16726.5
1688	----	16850.0	----	16727.0
1689	----	16850.5	----	16727.5
1690	----	16851.0	----	16728.0
1691	----	16851.5	----	16728.5
1692	----	16852.0	----	16729.0
1693	----	16852.5	----	16729.5
1694	----	16853.0	----	16730.0
1695	----	16853.5	----	16730.5
1696	----	16854.0	----	16731.0
1697	----	16854.5	----	16731.5
1698	----	16855.0	----	16732.0
1699	----	16855.5	----	16732.5
1700	----	16856.0	----	16733.0
1701	----	16856.5	----	16733.5
1702	----	16857.0	----	16739.0
1703	----	16857.5	----	16739.5
1704	----	16858.0	----	16740.0
1705	----	16858.5	----	16740.5
1706	----	16859.0	----	16741.0
1707	----	16859.5	----	16741.5
1708	----	16860.0	----	16742.0
1709	----	16860.5	----	16742.5
1710	----	16861.0	----	16743.0
1711	----	16861.5	----	16743.5
1712	----	16862.0	----	16744.0
1713	----	16862.5	----	16744.5
1714	----	16863.0	----	16745.0
1715	----	16863.5	----	16745.5
1716	----	16864.0	----	16746.0

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1717	----	16864.5	----	16746.5
1718	----	16865.0	----	16747.0
1719	----	16865.5	----	16747.5
1720	----	16866.0	----	16748.0
1721	----	16866.5	----	16748.5
1722	----	16867.0	----	16749.0
1723	----	16867.5	----	16749.5
1724	----	16868.0	----	16750.0
1725	----	16868.5	----	16750.5
1726	----	16869.0	----	16751.0
1727	----	16869.5	----	16751.5
1728	----	16870.0	----	16752.0
1729	----	16870.5	----	16752.5
1730	----	16871.0	----	16753.0
1731	----	16871.5	----	16753.5
1732	----	16872.0	----	16754.0
1801	----	19681.0	----	18870.5
1802	----	19681.5	----	18871.0
1803	----	19682.0	----	18871.5
1804	----	19682.5	----	18872.0
1805	----	19683.0	----	18872.5
1806	----	19683.5	----	18873.0
1807	----	19684.0	----	18873.5
1808	----	19684.5	----	18874.0
1809	----	19685.0	----	18874.5
1810	----	19685.5	----	18875.0
1811	----	19686.0	----	18875.5
1812	----	19686.5	----	18876.0
1813	----	19687.0	----	18876.5
1814	----	19687.5	----	18877.0
1815	----	19688.0	----	18877.5
1816	----	19688.5	----	18878.0
1817	----	19689.0	----	18878.5
1818	----	19689.5	----	18879.0
1819	----	19690.0	----	18879.5
1820	----	19690.5	----	18880.0
1821	----	19691.0	----	18880.5
1822	----	19691.5	----	18881.0

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Paired frequencies for NBDP and data transmissions (kHz)
(table continued)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
2201	22561.5	22376.5	22192.5	22284.5
2202	22562.0	22377.0	22193.0	22285.0
2203	22562.5	22377.5	22193.5	22285.5
2204	22563.0	22378.0	22194.0	22286.0
2205	22563.5	22378.5	22194.5	22286.5
2206	22564.0	22379.0	22195.0	22287.0
2207	22564.5	22379.5	22195.5	22287.5
2208	22565.0	22380.0	22196.0	22288.0
2209	22565.5	22380.5	22196.5	22288.5
2210	22566.0	22381.0	22197.0	22289.0
2211	22566.5	22381.5	22197.5	22289.5
2212	22567.0	22382.0	22198.0	22290.0
2213	22567.5	22382.5	22198.5	22290.5
2214	22568.0	22383.0	22199.0	22291.0
2215	22568.5	22383.5	22199.5	22291.5
2216	22569.0	22384.0	22200.0	22292.0
2217	22569.5	22384.5	22200.5	22292.5
2218	22570.0	22385.0	22201.0	22293.0
2219	22570.5	22385.5	22201.5	22293.5
2220	22571.0	22386.0	22202.0	22294.0
2221	22571.5	22386.5	22202.5	22294.5
2222	22572.0	22387.0	22203.0	22295.0
2223	22572.5	22387.5	22203.5	22295.5
2224	22573.0	22388.0	22204.0	22296.0
2225	22573.5	22388.5	22204.5	22296.5
2226	22574.0	22389.0	22205.0	22297.0
2227	22574.5	22389.5	22205.5	22297.5
2228	22575.0	22390.0	22206.0	22298.0
2229	22575.5	22390.5	22206.5	22298.5
2230	22576.0	22391.0	22207.0	22299.0
2231	22576.5	22391.5	22207.5	22299.5
2232	22577.0	22392.0	22208.0	22300.0
2233	22577.5	22392.5	22208.5	22300.5
2234	22578.0	22393.0	22209.0	22301.0
2235	22578.5	22393.5	22209.5	22301.5
2236	22579.0	22394.0	22210.0	22302.0
2237	22579.5	22394.5	22210.5	22302.5
2238	22580.0	22395.0	22211.0	22303.0
2239	22580.5	22395.5	22211.5	22303.5
2240	22581.0	22396.0	22212.0	22304.0
2241	22581.5	22396.5	22212.5	22304.5

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2242	22582.0	22397.0	22213.0	22305.0
2243	22582.5	22397.5	22213.5	22305.5
2244	22583.0	22398.0	22214.0	22306.0
2245	22583.5	22398.5	22214.5	22306.5
2246	22584.0	22399.0	22215.0	22307.0
2247	22584.5	22399.5	22215.5	22307.5
2248	22585.0	22400.0	22216.0	22308.0
2249	22585.5	22400.5	22216.5	22308.5
2250	22586.0	22401.0	22217.0	22309.0
2251	22586.5	22401.5	22217.5	22309.5
2252	22587.0	22402.0	22218.0	22310.0
2253	22587.5	22402.5	22218.5	22310.5
2254	22588.0	22403.0	22219.0	22311.0
2255	22588.5	22403.5	22219.5	22311.5
2256	22589.0	22404.0	22220.0	22312.0
2257	22589.5	22404.5	22220.5	22312.5
2258	22590.0	22405.0	22221.0	22313.0
2259	22590.5	22405.5	22221.5	22313.5
2260	22591.0	22406.0	22222.0	22314.0
2261	22591.5	22406.5	22222.5	22314.5
2262	22592.0	22407.0	22223.0	22315.0
2263	22592.5	22407.5	22223.5	22315.5
2264	22593.0	22408.0	22224.0	22316.0
2265	22593.5	22408.5	22224.5	22316.5
2266	22594.0	22409.0	22225.0	22317.0
2267	22594.5	22409.5	22225.5	22317.5
2268	----	22410.0	----	22318.0
2269	----	22410.5	----	22318.5
2270	----	22411.0	----	22319.0
2271	----	22411.5	----	22319.5
2272	----	22412.0	----	22320.0
2273	----	22412.5	----	22320.5
2274	----	22413.0	----	22321.0
2275	----	22413.5	----	22321.5
2276	----	22414.0	----	22322.0
2277	----	22414.5	----	22322.5
2278	----	22415.0	----	22323.0
2279	----	22415.5	----	22323.5
2280	----	22416.0	----	22324.0
2281	----	22416.5	----	22324.5
2282	----	22417.0	----	22325.0
2283	----	22417.5	----	22325.5
2284	----	22418.0	----	22326.0
2285	----	22418.5	----	22326.5
2286	----	22419.0	----	22327.0
2287	----	22419.5	----	22327.5
2288	----	22420.0	----	22328.0
2289	----	22420.5	----	22328.5
2290	----	22421.0	----	22329.0

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2291	----	22421.5	----	22329.5
2292	----	22422.0	----	22330.0
2293	----	22422.5	----	22330.5
2294	----	22423.0	----	22331.0
2295	----	22423.5	----	22331.5
2296	----	22424.0	----	22332.0
2297	----	22424.5	----	22332.5
2298	----	22425.0	----	22333.0
2299	----	22425.5	----	22333.5
2300	----	22426.0	----	22334.0
2301	----	22426.5	----	22334.5
2501	----	26101.0	----	25173.0
2502	----	26101.5	----	25173.5
2503	----	26102.0	----	25174.0
2504	----	26102.5	----	25174.5
2505	----	26103.0	----	25175.0
2506	----	26103.5	----	25175.5
2507	----	26104.0	----	25176.0
2508	----	26104.5	----	25176.5
2509	----	26105.0	----	25177.0
2510	----	26105.5	----	25177.5
2511	----	26106.0	----	25178.0
2512	----	26106.5	----	25178.5
2513	----	26107.0	----	25179.0
2514	----	26107.5	----	25179.5
2515	----	26108.0	----	25180.0
2516	----	26108.5	----	25180.5
2517	----	26109.0	----	25181.0
2518	----	26109.5	----	25181.5
2519	----	26110.0	----	25182.0
2520	----	26110.5	----	25182.5

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Non-paired frequencies for NBDP and data transmissions: The following table supersedes the previous frequencies available for authorized ship stations simplex operations as prescribed in 47 C.F.R. § 80.361(b). Public coast stations may receive only on the frequencies listed here. All frequencies listed after the "line break" are additional frequencies that resulted from expanding the spectrum allocated for simplex NBDP and data transmissions.

Ch. Ser.	Non-Paired NBDP Channels (kHz)							
1	4202.5	6300.5	8396.5	12560.0	16785.0	18893.0	22352.0	25193.0
2	4203.0	6301.0	8397.0	12560.5	16785.5	18893.5	22352.5	25193.5
3	4203.5	6301.5	8397.5	12561.0	16786.0	18894.0	22353.0	25194.0
4	4204.0	6302.0	8398.0	12561.5	16786.5	18894.5	22353.5	25194.5
5	4204.5	6302.5	8398.5	12562.0	16787.0	18895.0	22354.0	25195.0
6	4205.0	6303.0	8399.0	12562.5	16787.5	18895.5	22354.5	25195.5
7	4205.5	6303.5	8399.5	12563.0	16788.0	18896.0	22355.0	25196.0
8	4206.0	6304.0	8400.0	12563.5	16788.5	18896.5	22355.5	25196.5
9	4206.5	6304.5	8400.5	12564.0	16789.0	18897.0	22356.0	25197.0
10	4207.0	6305.0	8401.0	12564.5	16789.5	18897.5	22356.5	25197.5
11		6305.5	8401.5	12565.0	16790.0	18898.0	22357.0	25198.0
12		6306.0	8402.0	12565.5	16790.5		22357.5	25198.5
13		6306.5	8402.5	12566.0	16791.0		22358.0	25199.0
14		6307.0	8403.0	12566.5	16791.5		22358.5	25199.5
15		6307.5	8403.5	12567.0	16792.0		22359.0	25200.0
16		6308.0	8404.0	12567.5	16792.5		22359.5	25200.5
17		6308.5	8404.5	12568.0	16793.0		22360.0	25201.0
18		6309.0	8405.0	12568.5	16793.5		22360.5	25201.5
19		6309.5	8405.5	12569.0	16794.0		22361.0	25202.0
20		6310.0	8406.0	12569.5	16794.5		22361.5	25202.5
21		6310.5	8406.5	12570.0	16795.0		22362.0	25203.0
22		6311.0	8407.0	12570.5	16795.5		22362.5	25203.5
23		6311.5	8407.5	12571.0	16796.0		22363.0	25204.0
24			8408.0	12571.5	16796.5		22363.5	25204.5
25			8408.5	12572.0	16797.0		22364.0	25205.0
26			8409.0	12572.5	16797.5		22364.5	25205.5
27			8409.5	12573.0	16798.0		22365.0	25206.0
28			8410.0	12573.5	16798.5		22365.5	25206.5
29			8410.5	12574.0	16799.0		22366.0	25207.0
30			8411.0	12574.5	16799.5		22366.5	25207.5
31			8411.5	12575.0	16800.0		22367.0	25208.0
32			8412.0	12575.5	16800.5		22367.5	
33			8412.5	12576.0	16801.0		22368.0	
34			8413.0	12576.5	16801.5		22368.5	
35			8413.5		16802.0		22369.0	
36			8414.0		16802.5		22369.5	
37					16803.0		22370.0	
38					16803.5		22370.5	

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39					16804.0		22371.0	
40							22371.5	
41							22372.0	
42							22372.5	
43							22373.0	
44							22373.5	
45							22374.0	

Ship frequencies for facsimile: The following table describes the frequency changes for ship stations operating facsimile in accordance with 47 C.F.R. § 80.363(a).

Ship Facsimile Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2069.1	2070.5
----	2074.5
4159.2	4154.5
6327.2	6235.5
8324.6	8302.5
12483.6	12370.4
16652.6	16551.5
----	18847.5
22184.6	22181.5
----	25123.5
2075.1	2072.5
----	2076.5
4166.6	4169.5
6241.2	6259.5
8340.1	8338.5
12487.6	12418.5
16656.6	16614.5
----	18868.5
22188.6	22238.5
----	25159.5

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Coast frequencies for facsimile: The following table describes the exclusive maritime mobile HF frequency bands that are available for assignment to coast stations using 3 kHz channels for facsimile in accordance with 47 C.F.R. § 80.363(b). However, any frequency in the 2000-27500 kHz bands listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services, except for the 4000-4063 kHz and the 8100-8195 kHz bands, is available for assignment to coast stations for facsimile. Frequency assignments are subject to coordination with government users.

Frequency bands for Coast facsimile (kHz)	
4221.0 - 4351.0	16904.5 - 17242.0
6332.5 - 6501.0	19705.0 - 19755.0
8438.0 - 8707.0	22445.5 - 22696.0
12658.5 - 13077.0	26122.5 - 26145.0

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ATTACHMENT C

HF-SSB Frequencies for Public Correspondence (Public Coast)

Call and reply HF-SSB frequencies: The following table describes the frequency changes for stations operating call and reply radiotelephony in accordance with 47 C.F.R. § 80.369(d).

Call and Reply Radiotelephony Carrier Frequencies (kHz)				
	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
421	----	4417 [1]	----	4125 [1,2,3]
606	----	6516 [1]	----	6215 [2,3]
821	8780.9	8779	8257.0	8255
1221	13162.8	13137	12392.0	12290 [3]
1621	17294.9	17302	16522.0	16420 [3]
1806	----	19770	----	18795
2221	22658.0	22756	22062.0	22060
2510	----	26172	----	25097

1 The frequencies 4125 kHz, 4417 kHz, and 6516 kHz are also available on a simplex basis for private communications.

2 The frequencies 4125 kHz and 6215 kHz are also available on a simplex basis to ship and coast stations for call and reply, provided that the peak envelope power does not exceed 1 kW.

3 The frequencies 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz are also available on a simplex basis for distress and safety traffic.

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HF-SSB frequencies for public correspondence: The following table describes the frequency changes for stations operating duplex radiotelephony for public correspondence in accordance with 47 C.F.R. § 80.371(b).

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. Any coast station that desires additional frequencies must apply to the Federal Communications Commission.

Duplex Public Correspondence Channels Carrier Frequencies (kHz)				
	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
401	4357.4	4357.0	4063.0	4065.0
403	4363.6	4363.0	4069.2	4071.0
404	4366.7	4366.0	4072.3	4074.0
405	4369.8	4369.0	4075.4	4077.0
409	4382.2	4381.0	4087.8	4089.0
410	4385.3	4384.0	4090.9	4092.0
411	4388.4	4387.0	4094.0	4095.0
412	4391.5	4390.0	4097.1	4098.0
414	4397.7	4396.0	4103.3	4104.0
416	4403.9	4402.0	4109.5	4110.0
417	4407.0	4405.0	4112.6	4113.0
418	4410.1	4408.0	4115.7	4116.0
419	4413.2	4411.0	4118.8	4119.0
422	4422.5	4420.0	4128.1	4128.0
423	4425.6	4423.0	4131.2	4131.0
604	6515.7	6510.0	6209.3	6209.0
605	6518.8	6513.0	6212.4	6212.0
802	8722.0	8722.0	8198.1	8198.0
803	8725.1	8725.0	8201.2	8201.0
804	8728.2	8728.0	8204.3	8204.0
805	8731.3	8731.0	8207.4	8207.0
807	8737.5	8737.0	8213.6	8213.0
808	8740.6	8740.0	8216.7	8216.0
809	8743.0	8743.0	8219.8	8219.0
810	8746.8	8746.0	8222.9	8222.0
811	8749.9	8749.0	8226.0	8225.0
814	8759.2	8758.0	8235.3	8234.0
815	8762.3	8761.0	8238.4	8237.0
822	8784.0	8782.0	8260.1	8258.0
824	8790.2	8788.0	8266.3	8264.0

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825	8793.3	8791.0	8269.4	8267.0
826	8796.4	8794.0	8272.5	8270.0
829	8805.7	8803.0	8281.8	8279.0
830	8808.8	8806.0	8284.9	8282.0
831	8811.9	8809.0	8288.0	8285.0
1201	13100.8	13077.0	12330.0	12230.0
1202	13103.9	13080.0	12333.1	12233.0
1203	13107.0	13083.0	12336.2	12236.0
1206	13116.3	13092.0	12345.5	12245.0
1208	13122.5	13098.0	12351.7	12251.0
1209	13125.6	13101.0	12354.8	12254.0
1210	13128.7	13104.0	12357.9	12257.0
1211	13131.8	13107.0	12361.0	12260.0
1212	13134.9	13110.0	12364.1	12263.0
1215	13144.2	13119.0	12373.4	12272.0
1222	13165.9	13140.0	12395.1	12293.0
1223	13169.0	13143.0	12398.2	12296.0
1225	13175.2	13149.0	12404.4	12302.0
1226	13178.2	13152.0	12407.5	12305.0
1228	13184.5	13158.0	12413.7	12311.0
1229	13187.6	13161.0	12416.8	12314.0
1230	13190.7	13164.0	12419.9	12317.0
1601	17232.9	17242.0	16460.0	16360.0
1602	17236.0	17245.0	16463.1	16363.0
1603	17239.1	17248.0	16466.2	16366.0
1605	17245.3	17254.0	16472.4	16372.0
1607	17251.5	17260.0	16478.6	16378.0
1609	17257.7	17266.0	16484.8	16384.0
1610	17260.8	17269.0	16487.9	16387.0
1611	17263.9	17272.0	16491.0	16390.0
1616	17279.4	17287.0	16506.5	16405.0
1620	17291.8	17299.0	16518.9	16417.0
1624	17304.2	17311.0	16531.3	16429.0
1626	17310.4	17317.0	16537.5	16435.0
1631	17325.9	17332.0	16553.0	16450.0
1632	17329.0	17335.0	16556.1	16453.0
1641	17356.9	17362.0	16584.0	16480.0
2201	22596.0	22696.0	22000.0	22000.0
2205	22608.4	22708.0	22012.4	22012.0
2210	22623.9	22723.0	22027.9	22027.0
2214	22636.3	22735.0	22040.3	22039.0
2215	22639.4	22738.0	22043.4	22042.0
2216	22642.5	22741.0	22046.5	22045.0
2222	22661.1	22759.0	22065.1	22063.0
2223	22664.2	22762.0	22068.2	22066.0
2227	22676.6	22774.0	22080.6	22078.0

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2228	22679.7	22777.0	22083.7	22081.0
2231	22689.0	22786.0	22093.0	22090.0
2236	22704.5	22801.0	22108.5	22105.0
2237	22707.6	22804.0	22111.6	22108.0

Additional HF-SSB frequencies for public correspondence: The following table specifies the additional carrier frequencies available to public coast stations for public correspondence. **These additional coast station frequencies must be authorized by the Commission before use.** The paired ship frequencies are available for use by any ship station authorized to use HF-SSB frequencies (Radiotelephone 4000-23000 kHz). The specific frequency assignment available to public coast stations for a particular geographic area is indicated by an "x" under the appropriate column. Table B is based on the initial Appendix 25 Allotment Arrangement published by the International Frequency Registration Board (IFRB) (see IFRB Circular-letter No. 836, dated September 28, 1990). The allotment areas are in accordance with the "Standard Defined Areas" as identified in the Appendix 25 Planning System (see IFRB letter to the Federal Communications Commission dated March 16, 1990, and IFRB Circular-letter No. 843, dated October 31, 1990).

NOTE: Additionally, frequencies in the 16, 18, 22, and 25 MHz bands were adopted for assignment to public coast stations for shared simplex operations with other U.S. government and foreign users. Frequencies in the 4000-4063 kHz and the 8100-8195 kHz bands were also provided subject to coordination with government users. See Report and Order, PR Docket No. 90-133, for details.

TABLE B - PUBLIC CORRESPONDENCE (ADDITIONAL DUPLEX CHANNELS)
Working carrier frequency pairs in the 4000-27500 kHz band

Channel	Ship Transmit (Carrier frequencies (kHz))	Coast Transmit (Carrier frequencies (kHz))	USA-E	USA-W	USA-S	USA-C	VIR	HWA	ALS	PTR	GUM
427	4143.0	4435.0	x	x	x	x	x	x	x	-	x
428	4060.0	4351.0	x	x	x	x	x	x	x	x	x
607	6218.0	6519.0	x	x	x	x	x	x	x	x	x
836	8113.0	8713.0	x	x	x	x	x	x	x	x	x
837	8128.0	8716.0	x	x	x	x	x	x	x	x	x
1233	12326.0	13173.0	x	x	x	x	x	x	x	x	x
1234	12329.0	13176.0	-	x	x	-	-	x	x	-	x
1235	12332.0	13179.0	x	x	x	x	x	x	x	x	x
1236	12335.0	13182.0	-	x	x	-	-	x	-	-	-
1237	12338.0	13185.0	x	-	x	x	x	-	-	x	-

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1642	16483.0	17365.0	x	x	x	x	x	x	x	x	x
1643	16486.0	17368.0	x	x	x	x	x	x	x	x	x
1644	16489.0	17371.0	x	x	x	x	-	x	x	-	x
1645	16492.0	17374.0	x	x	x	x	x	x	x	x	x
1646	16495.0	17377.0	-	x	-	-	-	-	-	-	-
1647	16498.0	17380.0	x	x	x	x	-	x	x	-	x
1648	16501.0	17383.0	-	x	-	x	x	x	x	x	x
1801	18780.0	19755.0	x	x	x	x	x	x	x	x	x
1802	18783.0	19758.0	x	-	x	x	x	-	-	x	-
1803	18786.0	19761.0	x	x	-	x	x	x	x	x	x
1804	18789.0	19764.0	-	x	x	-	-	x	x	-	-
1805	18792.0	19767.0	-	x	-	-	-	x	x	-	-
1807	18798.0	19773.0	x	x	x	x	x	x	x	x	x
1808	18801.0	19776.0	x	x	x	x	x	x	x	x	x
2241	22120.0	22816.0	x	x	x	x	x	x	x	x	x
2242	22123.0	22819.0	x	x	x	x	x	x	x	x	x
2243	22126.0	22822.0	x	x	x	x	x	x	x	x	-
2244	22129.0	22825.0	-	x	-	-	-	x	x	-	-
2245	22132.0	22828.0	-	x	x	-	-	x	x	-	-
2246	22135.0	22831.0	x	x	x	x	-	x	x	-	x
2247	22138.0	22834.0	x	x	x	x	x	x	x	-	x
2501	25070.0	26145.0	x	x	x	x	-	x	x	-	x
2502	25073.0	26148.0	x	x	x	x	x	x	x	x	-
2503	25076.0	26151.0	x	x	x	x	x	x	x	-	-
2504	25079.0	26154.0	x	x	x	x	x	x	x	x	x

Public correspondence on the Mississippi River: The following table describes the frequency changes for stations operating public correspondence within the Mississippi River System in accordance with 47 C.F.R. § 80.371(d). In a few instances, the Commission substituted different frequencies than those indicated in previous documents (i.e., Notice of Proposed Rule Making, PR Docket No. 90-133, or Public Notices released March 16, 1990). We have indicated those frequencies with an asterisk (*).

Mississippi River System Working Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
4063.0	4065
4087.8	4089
4115.7	4116

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4410.1	4408
6209.3	6209
6212.4	6212
6515.7	6510
6518.8	6513
8201.2	8201
8213.6	8213
8725.1	8725
8737.5	8737
12333.1	12362*
13103.9	12365*
16518.9	16543*
17291.8	16546*

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ATTACHMENT D

HF-SSB Frequencies for Private Communications (Private Coast)

SSB frequencies for private communications: The following table describes the frequencies between 2000-27500 kHz that are available for stations conducting private communications in accordance with 47 C.F.R. § 80.373(c). The additional frequencies adopted for private communications effective July 1, 1991, are indicated with an asterisk (*). See Report and Order, PR Docket No. 90-133, for details.

Reminder -- Coast stations are authorized to operate on their frequency equivalent only. They need not file an application to modify of their license. Any ship authorized to use MF-SSB (Radiotelephone 1600-4000 kHz) and HF-SSB (Radiotelephone 4000-23000 kHz) may operate on the frequencies listed below, including frequencies 25115 kHz and 25118 kHz. Any coast station that desires additional frequencies, or ship stations that desire to add the HF-SSB authorization to its license, must apply to the Federal Communications Commission. For further information contact: Consumer Assistance Branch, Licensing Division, Private Radio Bureau, Federal Communications Commission, Gettysburg, PA 17325-7245; or telephone 717-337-1212.

Business and Operational Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2065.0 [1,3]	no change
2079.0 [1,3]	no change
2096.5 [1]	no change
3023.0 [4]	no change
4125.0 [2]	no change
4143.6	4146
4419.4	4149
----	*4417 [5]
5680.0 [4]	no change
6218.6	6224
6221.6	6227
6521.9	6230
----	*6516 [5]
8291.1	8294
8294.2	8297
12429.2	12353
12432.3	12356
12435.4	12359
16587.1	16528
16590.2	16531

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----	*18840
----	*18843
16593.3	16534
22124.0	22159
22127.1	22162
22130.2	22165
22133.3	22168
22136.4	22171
----	*25115
----	*25118

1 Limited to peak envelope power of 150 watts.
2 Available domestically for distress and safety and internationally for calling purposes.
3 The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.
4 The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.
5 The frequency 6516 kHz is limited to daytime operations. The frequencies 4417 kHz and 6516 kHz are also available for calling and reply.

Private communications in Alaska: Stations authorized in the 4 MHz frequency band for private radiotelephony communications in Alaska, 47 C.F.R. § 80.373(i), must change frequency in accordance with the following table:

Alaska Private Communications Carrier Frequencies (kHz)	
Frequency prior to July 1, 1991	Frequency as of July 1, 1991
4366.7	4366
4369.8	4369
4397.7	4396
4403.9	4402
4422.5	4420
4425.6	4423

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